Supreme Court, U.S.
FILED

001 8 2 5 JUN - 4 2001

OFFICE OF THE CLERK

No. 00-5609

In The Supreme Court of the United States

In Re: Samuel Bunyan Davis, Jr.

SAMUEL BUNYAN DAVIS, JR.,
Petitioner,

v.

ESTATE OF GLADYS LOUISE BARCLAY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Samuel B. Davis, Jr.
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101pp

QUESTIONS PRESENTED

1. Supreme Court of Virginia Rule 5:17 contains the following:

> Where appeal is taken from a judgment of the Court of Appeals in a case where judgment is made final under Code @ 17.1-410, the petition for appeal shall contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) ,atters of significant precedential value. If the petition for appeal does not contain such a statement, the appeal will be dismissed.

Is unequal application of a rule requiring a statement in a second Petition for Appeal in the same case a violation of Petitioner's right to due process and equal protection of the law under the Fifth and Fourteenth Amendment to the Constitution of the United States when the petition clearly states a substantial constitutional issue and uses the same language as the first Petition for Appeal filed in this case and not objected to by this Court?

PARTIES TO THE PROCEEDING

PETITIONER

Samuel Buńyan Davis, Jr.

RESPONDENT

Estate of Gladys Louise Barclay
Successor in interest to Louise Barclay Davis

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JURISDICTION

This case comes to the Supreme Court of the United States as a second petition for a writ of certiorari on a final order of the Supreme Court of Virginia entered on March 5, 2001 in a divorce matter.

A final decree of divorce was entered by the Circuit Court of the City of Newport News on April 10, 1997. Appeal was taken to the Court of Appeals of Virginia and denied. Appeal was taken to the Supreme Court of Virginia and denied. A petition for a writ of certiorari was filed with this Court and denied. A motion for rehearing was filed. While this was pending the case was reopened and a second final order was entered on January 6, 2000. This order was appealed to the Court of Appeals of Virginia which denied. A petition for appeal was filed with the Supreme Court of Virginia. It is the denial of the petition for appeal that brings this case before the Court.

STATEMENT OF THE CASE

This is a divorce case in which there are two incontrovertible facts:

1. The Bill of Complaint was filed in the Circuit Court for the City of Newport News on July 25, 1995, and

2. There was no service of process by personal, posting or publication until May 7, 1996.

And yet, during that time Judge Robert P. Frank held a hearing and entered an order, a five unit police raid was

staged to enforce that order, and the Supreme Court of Virginia appointed retired Judge James C. Godwin substitute.

Petitioner and Respondent were married on September 22, 1956. They had no children. They lived together until the early morning of June 22, 1995 when Respondent called 911 to have police come to the marital residence and detain Petitioner until an Evaluator from Contact could come and evaluate Petitioner for commitment. The police came, decided that Petitioner was no danger to himself or Respondent and refused to stay until the Contact office opened at 8:00 a.m. Respondent then decided to leave the marital residence. The police remained until Respondent's sister Leila Barclay Hine arrived to take her away.

Respondent took up residence at Riverside Convalescent Center in Smithfield, Virginia. The divorce suit was filed on July 25, 1995. Petitioner is an attorney, having been admitted to the bar in 1952. There was no service of process, Respondent's attorney Kenneth B. Murov of the law firm of Jones, Blechman, Woltz & Kelly, P.C. knowing that Petitioner would vigorously contest it. Notwithstanding the lack of service Murov scheduled and held a *pendente lite* hearing before Judge Robert P. Frank on November 2, 1995. No order was entered at the conclusion of the hearing. On November 7, 1995 Judge Frank wrote the Supreme Court of Virginia requesting the appointment of a substitute judge as all judges of the circuit had recused themselves. The order on the hearing was entered on November 17, 1995 (Exhibit No. 2). Handwritten on the order was "serve 40 Barclay Rd" an asterisk and at the bottom "the Defendant was not present but was duly notified". A reasonable explanation for

holding the hearing without proof of service in the file would be that Judge Frank was persuaded to continue upon assurances by Murov that Petitioner had been served with the Bill of Complaint and that proof of service would be filed. When he was unable to furnish proof of service the most charitable explanation is that he prevailed upon a compassionate judge to give the marital residence to a severely disabled 63 year old woman who was wrongfully evicted by a deranged husband.

On Friday December 8, 1995 at 4:38 p.m. Respondent again called 911. Petitioner brings to the attention of this Court the fact that in Virginia upon a detention for suspicion of being mentally ill a person may be held for 72 hours without counsel before being afforded a hearing by a magistrate. He is required to submit to any medication ordered by a physician. Magistrates do not hold hearings on Saturdays or Sundays. If Petitioner could be detained for evaluation on Friday afternoon he could have been held incommunicado until the following Thursday morning.

Five police units responded to the 911 call (Exhibit No. 3). Petitioner responded to a very loud knock on a solid oak door by a Colonial Williamsburg "S" knocker by putting on his shoes and asking through the door who it was. The reply was "Police". Petitioner asked through the door "Do you have a warrant?". The reply was "We have a court order". Petitioner did not respond. An officer said "Mr. Davis, you might as well open the door. We have a key". With that Petitioner cracked open the door several inches. Two officers rushed the door, throwing Petitioner into the hall wall. Frantic, Petitioner ran to his bedroom with the officers close behind. Petitioner was roughly grabbed by the officers, one on each arm. Petitioner said he was going to get a handkerchief and the officers relaxed

their grip. Petitioner then went to the living room, got his keys, wallet and a leather jacket and tried to leave. Two other officers were blocking the fromt door. Petitioner had to fight his way between them to get out. As Petitioner was leaving in his car an officer called out from inside the house "Mr. Davis...come back...come back". Petitioner had to drive over the lawn to get around the police cars.

On December 22, 1995 the Supreme Court of Virginia appointed retired Judge James C. Godwin of Suffolk to hear the case.

No attempt at service of the Bill of Complaint was made until May 7, 1996 when Ned Massey III posted the Bill of Complaint and video-taped Petitioner removing it from the door (Exhibit No. 4).

Judge Godwin appointed E. Thomas Cox Commissioner in Chancery to hear evidence and report his findings and recommendations to the Court. A transcript was taken of his hearing and is all of the evidence available to him in making his report. He made no independent inquiry or investigation. Based on his report Judge Godwin entered the FINAL DECREE OF DIVORCE (Exhibit No. 5). on April 10, 1997 over the objection of Petitioner.

Because this final decree disposes of two parcels of real estate, one titled "S. B. Davis, Jr. and Louise B. Davis, Trustees of Virginia Real Estate Trust" and the other "Virginia Real Estate Trust" it is necessary to examine the trust and Respondent's role in its' creation and administration.

Respondent was the consummate professional. She worked for such luminaries as lawyers Bill Allaun, Fred Bateman before he became judge, Dick Newman; Warwick

City Manager J. Clyde Morris, who picked her up every morning for work. More important she worked directly for both Frank Blechman and Arthur Woltz of lawyer Kenneth Murov's firm Jones, Blechman, Woltz & Kelly P.C. In addition, she worked for Tom Downing who became Of Counsel with the firm when he retired as Congressman from the First District. She was a licensed real estate broker.

After marriage Respondent worked for Petitioner in his law practice, which was primarily real estate. Petitioner assembled groups of nine investors and with himself formed five corporations which bought second mortgages at discount from builders who had taken them as down payment. The Treasury Department recognized a business entity known as a Real Estate Investment Trust (REIT) with the key provision that income, to the extent that it was distributed to shareholders was not taxable. Virginia trust law was changed to recognize this entity.

Petitioner and Respondent formed Virginia Real Estate Trust with themselves as trustees by filing a Declaration of Trust in Clerk's Offices where real estate might be involved. The tax code required 100 shareholders. Petitioner began selling shares at $100 each, limiting each shareholder to one share. Ownership of the trust was evidenced by "Certificates of Interest" and was regarded in the nature of a partnership not requiring registration under the Blue Sky Law. When 100 shareholders were signed up the five corporations were dissolved and shares of Virginia Real Estate Trust issued. The corporations had used borrowed money by pledging assets with personal endorsements of shareholders. Petitioner and Respondent consolidated all of these loans and personally endorsed the note of Virginia Real Estate Trust.

Expansion of the trust was accomplished by the issuance of warrants to shareholders in proportion to their holdings. The trust finally settled into operation with 3,460 shares outstanding. Interest rates were low. Passbook rates were 4.00 per cent. Virginia limited rates to 6.00 percent. Petitioner and Respondent were paying their investors (and receiving on their own investment) 11.00 and 12.00 per cent annually. Rates began to rise. Virginia removed its' rate limit on first lien real estate loans. Petitioner then started making wraparound (sometimes called all-inclusive) loans. Rates continued to rise. In August 1981 the rate on bellwether 30 year Treasury Bonds was 14%; New York City prime rate was 22%.

The bank loan was on a month to month renewal and the rate had been continually increased until it reached 17%. Petitioner and Respondent changed banks and reversed the arrangement. They established a personal line of credit loan with Old Point National Bank of Phoebus in the amount of $250,000 and had Virginia Real Estate Trust endorse the note and pledge its' notes as collateral. They then proceeded to redeem as many shares as possible at the par value of $100. Despite never missing an interest payment or being late the bank called the loan. With money obtained from his aunt, Louise D. Haynes, Petitioner paid off the loan on June 12, 1992 in the amount of $189,873.36. Of the 3,460 shares outstanding they had redeemed all but 1,050 when Respondent dialed 911 on June 22, 1995.

An appeal of right of the April 10, 1997 final decree was made to the Court of Appeals of Virginia. A Memomandorum (sic) of Lis Pendens was filed on the marital residence. Respondent died on November 14, 1997. Kenneth B. Murov and John W. Churchill qualified as Co-

Administrators of her estate. Notwithstanding the Lis Pendens the marital residence was sold by Respondent's three sisters and three nieces.

On September 10, 1998 Petitioner was taken to the hospital after lying unconscious on his bedroom floor for five days. A neighbor saw a newspaper on the top of Petitioner's car in the driveway, investigated, saw four more on the ground and called 911. Petitioner received extensive surgery and remained in the Intensive Care Unit until 4:30 p.m. on September 18, 1998. At 5:05 p.m. on that date Petitioner was served with Notice and Motion for Relief by Ned Massey in Room 439 (Exhibit No. 6).

This Motion for Relief was to get $8,710.83 held by the Clerk of the Circuit Court of the City of Hampton as the pay-off on the loan of Myrtle Gwaltney held by Virginia Real Estate Trust. Petitioner filed a Motion to Quash which included a plea for continuance based on his hospitalization. Judge Godwin rejected this motion, writing across the bottom "Filed 10/5/98 No appearance no Drs certificate nothing to cause continuance other than mere allegation" (Exhibit No.7).

The hearing was held as scheduled. Judge Godwin entered an order awarding the entire Gwaltney pay-off to Murov and Churchill as Co-Administrators of Respondent's estate (Exhibit No. 8).

A divorce case may be reinstated for changes in custody and support. A divorce case may be reinstated for the administration of Equitable Distribution when it is bifurcated and reserved in the final decree. Dormant cases are removed from the docket and may be reinstated. All other cases must be reinstated under Code of Virginia Section 8.01-428 the only applicable part being fraud. All

reinstatements have three things in common: (1) there must be a motion for reinstatement (2) notice must be given to the opposite party and (3) a fee must be paid to the Clerk of Court. There is no motion for reinstatement in the file. No notice was given to Petitioner. A fee was paid to the Clerk on January 26, 1999 for the October 5, 1998 hearing (Exhibit No. 9).

There are three orders reinstating this case on the docket. The first two consist of two pages, the only entry on page two being "I ask for this:" and the signature "K B Murov". The signatures on page two are identical when superimposed. Number one is dated October 5, 1998 and bears the handwritten notation "Original mailed to Judge Godwin 9-29-98. Number two is dated October 26, 1998. Number three is identical in text with the first two, but has "I ask for this:" the name and address of Kenneth B. Murov and Jones, Blechman, Woltz & Kelly, P.C. on the only page. It is dated March 24, 1999. This was entered pursuant to Murov's letter to Clerk of Court Rex Davis dated January 26, 1999 (Exhibit No. 9).

Petitioner remained hospitalized until his discharge on December 26, 1998. Petitioner asked to be sent to Patrick Henry Hospital , a nursing facility owned and operated by Riverside Regional Medical Center. He was refused because his income would not cover payments after the 30 days paid for by Medicare expired. Petitioner offered to make an assignment of his interest in $96,959.17 held by the Clerk of the Circuit Court for the City of Newport News in the suit of Simmons v. Davis Chancery No. 19129-RW, but was still refused. General Counsel for Riverside Regional is Herbert V. Kelly, Sr., senior partner in Jones, Blechman, Woltz & Kelly P.C. He also sits on the Board of Directors. Petitioner had previously thwarted

Kelly's attempt to sell the hospital to Columbia/HCA Healthcare.

After selling all of the real estate, getting the Myrtle Gwaltney Virginia Real Estate Trust pay-off and cashing the bearer bonds Murov turned his attention to the Simmons suit funds, which had been held by the Clerk for nine years in a non interest bearing account. This was started by scheduling two hearings for December 3, 1999. The first was before the Honorable Randolph T. West in the case of McKinley Simmons v. S. B. Davis, Jr. Chancery No. 19129-RW at 1:00 p.m. The second was before the Honorable James C. Godwin in Estate of Gladys Louise Barclay, Successor in interest to Louise Barclay Davis v. Samuel Bunyan Davis, Jr. Chancery No. 27095 at 2:00 p.m.

Because the final decree is silent on the Simmons money despite being apprised of it in an answer to a subpoena duces tecum, an objection to the Commissioner's report and an objection to entry of the final decree, it is necessary to explain its' origin and history.

Under his law license Petitioner began making construction loans to small builders unable to get financing from banks. To minimize the risk, the builder was given no money, Petitioner buying the lot and paying materialmen and subcontractors. Petitioner did not represent these builders. Disbursement were made on a "Check Request" form signed by the builder's attorney.

Respondent was an intregral participant in this process, to the extent of wearing a hard hat and making progress inspections for the Friday construction loan draws. She weathered such harassment as having a worker on a roof drop a piece of scrap lumber behind her as she made

one such inspection and the laughter that followed her reaction. Respondent was responsible for verifying that plumbers and electricians were the ones that got the permit for that job, a measure necessary to prevent the diversion of funds from one job to another. She also verified that subcontractors, such as drywall and landscaping had business licenses. Petitioner and Respondent together met on site with payment in certified funds for delivery and erection of manufactured housing. This caution was necessary as courts across the country were increasingly including lenders in the process and making them responsible to subcontractors and particularly to workers injured on the job, regardless of who they worked for. Petitioner made some subcontractors show proof of workman's compensation insurance.

Simmons was married and separated from his wife. His wife would have to sign all conveyances of real property. Petitioner established a land trust for him and all real property was titled "S. B. Davis, Jr. Trustee of Simmons Land Trust". Simmons was a minority contractor and as such was given preference in the purchase of lots from Newport News Redevelopment and Housing Authority. Petitioner bought 644 27th Street, Newport News, Virginia for Simmons. Lots are not sold for speculative building. Simmons represented to Petitioner that he was building for investment and presented a commitment from Atlantic Permanent Savings and Loan Association for a permanent take-out loan. In fact, through a local realtor, a building deal had been sold to a young black couple, Jerome L. and Wanda L. Gillis, who had pre-qualified for their loan. The house was three weeks from completion. The Gillises had sold their home and were living in a motel with their infant child. The proceeds of the sale were to be paid to Petitioner. The real estate company tried to persuade Petitioner to allow the proceeds to be paid to

Simmons. Petitioner refused. Simmons abandoned the job. The sale collapsed. The property was quickly vandalized and taken over by drug addicts.

Petitioner still held title to two lots and one completed house. Petitioner also was also trustee in a deed of trust given to Simmons in a previous sale and held the note as collateral. The note was in default. Simmons demanded Petitioner foreclose and when Petitioner refused brought the suit in question. Petitioner filed a cross claim. The case was referred to Commissioner in Chancery Clyde M. Weaver who held a hearing. After the hearing Petitioner located the Gillises through the deed book in the Hampton Circuit Court. On Saturday, November 3, 1990 talked with them and found out that their real estate company had referred them to a lawyer for free advice on whether or not to sue Simmons. That lawyer was Clyde M. Weaver.

On Sunday, November 4, 1990 Petitioner typed a three page ethical complaint to the Virginia State Bar against Clyde Weaver. The Virginia State Bar dismissed the complaint saying it was a quasi-judicial act and they had no jurisdiction. Petitioner then filed a complaint with the Judicial Inquiry and Review Commission which also dismissed. A complete copy of both of these complaints was published in ***The Daily Report*** on May 10, 1996. The completed house was sold and the note foreclosed producing $96,959.17 which has been held by Clerk of Court Rex A. Davis for nine years in a non-interest bearing account. The $22,039.78 sought by the Motion for Relief which is the subject of this petition is the result of a judgment entered by Judge Randolph T. West at the December 3, 1999 hearing.

Petitioner filed suit for violation of RICO and the Civil Rights Act in the United States District Court for the Eastern District of Virginia against Richard Hudgins, McKinley Simmons, Howard D. Andleton, James M. Dixon, Timothy L. Dalton, James S. Ellenson, Clyde M. Weaver, Lawrence J. Redding, Jr., Robert D. Hicks Randell C. Ogg and J. W. Hornsby, Jr. The District Court dismissed. Appeal was taken to the Fourth Circuit Court of Appeals which also dismissed. A petition for a writ of certiorari was filed with the Supreme Court of the United States which was denied. Petitioner filed a motion for rehearing. The judges of the District Court en banc fined Petitioner $500 for filing a frivolous suit.

Petitioner filed a six paragraph Petition for a Writ of Prohibition against the December 3, 1999 hearing with the Virginia Supreme Court in which he (1) quoted the dismissal from the docket in the Final Decree of Divorce (2) repeated plaintiff's allegation that he concealed the Simmons money (3) summarized and attached copy of answer to subpoena duces; summarized and attached objection to Commissioner's report (4) quoted Virginia Supreme Court Rule 1.1 (21 day rule) (5) cited fraud under Virginia Code Section 8.01-428 as the only cause for reopening a case and (6) stated that a copy was being sent to the Supreme Court of the United States as an exhibit to a pending application for a Writ of Certiorari. This petition was served personally on Judge Godwin in his dining room on Longreen Lane in Suffolk by Patricia Fromal, who was led there by the buyer of 708 North Broad Street, the address Judge Godwin maintained at the Virginia State Bar. It was was sent to the Virginia Supreme Court by Express U. S. Mail on Tuesday, November 30, 1999. Copies were mailed to Kenneth B. Murov and Clerk of Court Rex A. Davis. Weeks later the signature page was returned for a notary. (Exhibit No. 10)

On Friday, December 3, 1999 Petitioner delivered a Motion to Clerk of Court Rex A. Davis asking him to stop Judge Godwin from holding court in his courtroom as his appointment expired when he entered the final decree. Petitioned delivered a Motion to Judge Godwin asking him to disqualify himself for the same reason. Both hearings were held as scheduled. The hearings were taken down by a Court Reporter.

Having failed to stop the hearing Petitioner filed a six paragraph Petition for a Writ of Prohibition against the entry of an order based on the hearing in which he (1) quoted the dismissal from the docket in the Final Decree of Divorce (2) quoted Virginia Supreme Court Rule 1.1 (21 day rule) (3) cited fraud under Virginia Code Section 8.01-428 as the only cause for reopening a case (4) cited and attached copy of motion to Clerk of Court Rex Davis to stop Judge Godwin from using his courtroom on the grounds that his appointment had expired (5) cited and attached copy of motion to Judge Godwin asking him not to hold hearing on grounds that his appointment had expired and (6) stated that a copy was being sent to the Supreme Court of the United States as an exhibit to a pending application for a Writ of Certiorari. This petition, with exhibits and sworn proof of service on January 5, 2000 by posting on Judge James C. Godwin's front door were sent to the Virginia Supreme Court by regular U. S. Mail on January 5, 2000. Copies were mailed to Kenneth B. Murov and Clerk of Court Rex A. Davis Exhibit No. 11)

There is an order in this case (Exhibit No. 12) dated January 6, 2000 signed by Judge Godwin. Judge Godwin lives in Suffolk. There is no letter in the file from Clerk of Court Rex Davis to Judge Godwin submitting it for his signature. There is no letter in the file from Judge Godwin

to Clerk Davis submitting the order for entry. The order does not bear the clerk's time stamp showing date and time of receipt.

On February 3, 2000 Petitioner posted a $500 cash bond and perfected an appeal of right to this second final order to the Court of Appeals of Virginia. Upon returning home after filing the appeal Petitioner found in his mail a check from Clerk of Court Rex Davis for $48,479.58. The Court of Appeals of Virginia affirmed and dismissed the appeal. A Petition for Appeal was filed with the Supreme Court of Virginia. By order dated March 5, 2001 the Supreme Court dismissed stating in its' entirety:

> Finding that the petition for appeal does not contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of signaficant precedential value, the Court dismisses said petition filed in the above-styled case. Rule 5:17 (c). (Exhibit No. 14)

It is this order that is the subject of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This petition for appeal was dismissed under Virginia Supreme Court Rule 5:17 (Exhibit No. 15). Paragraph (c) of the rule states:

> Where appeal is taken from a judgment of the Court of Appeals in a case where judgment is made final under Code @ 17.1-410, the petition for appeal shall contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determanitive issue, or (2) matters of significant precedential value. If the petition for appeal does not contain such a statement, the appeal will be dismissed.

The dismissal of the petition for appeal on the basis of this paragraph that the petition does not contain a separate, stand-alone statement is a violation of Petitioner's right to due process and equal protection of the law under the Fifth and Fourteenth Amendment to the Constitution of the United States.

This is an unequal, inconsistent ruling in the same case. A previous petition for appeal was filed with the Supreme Court of Virginia on the first final order entered in this case. While denied, no objection was made to the lack of a specific statement. The instant petition for appeal uses the same language as the first.

Petitioner says that if paragraph (c) is to be interpreted to require a separate, stand-alone statement that Rule 5:17 is defective in that it should require it be set forth "under a separate heading" as are "Assignments of Error" and "Questions Presented". At the very least it should be listed with the five other requirements in the rule.

Petitioner asks this Court to examine the Petition for Appeal (Exhibit No. 16) in its' entirety and determine if it meets the requirements of Rule 5:17.

CONCLUSION

Petitioner asks this Court to remand this petition for appeal to the Supreme Court of Virginia with instructions to consider the petition on its' merits and render a decision thereon.

Respectfully submitted,

Samuel B. Davis, Jr.
Pro Se Petitioner
437 Winterhaven Drive
Newport News, Virginia 23606
Telephone (757) 930-8733

APPENDIX

APPENDIX

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VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

ESTATE OF GLADYS LOUISE BARCLAY,
Successor in interest to Louise Barclay Davis
Plaintiff

v.

SAMUEL BUNYAN DAVIS, JR.,
Defendant

MOTION FOR RELIEF

The undersigned, by counsel moves for the following relief for the reasons set forth hereinbelow:

1. An award of attorney fees and costs incurred by Plaintiff in her defense of the appeal by Defendant in this cause that was determined to be without merit (See September 5, 2000 decision of the Virginia Court of Appeals, Record No. 0271-00-1, which is attached hereto as Exhibit A. Plaintiff has incurred attorney fees and costs in the amount of $4,380.00 to defend the appeal (See attached Exhibit B) plus the expense of preparing this notice and motion for relief and appearing in court.

2. That Plaintiff and Defendant were divorced by this Court on April 10, 1997.

3. That the report of Commissioner E. Thomas Cox was filed with this Court on January 24, 1997 and was adopted, ratified and confirmed in the final decree.

Exhibit No. 1

4. That since the entry of the final decree of divorce, specifically, in April, 2001, counsel for Plaintifff has determined that there is $22,039.78 being held by the Clerk of this Court in Ch # 19129-RW, and that the aforesaid money represents an asset that existed prior to the separation of Plaintiff and Defendant on June 22, 1995. This is a different sum of money from the $96,000.00 previously heard by the Court in Chancery No. 19129-RW.

5. Defendant did not disclose the existence of this money or the lawsuit in his discovery responses in the divorce proceedings notwithstanding discovery served on him on January 4, 1996 and notwithstanding his opportunity to appear at the Commissioner's hearing on December 16, 1996 and the hearing to enter the final decree in this cause on April 10, 1997. Defendant failed to appear at both of these hearings.

6. Virginia law requires that the $22,039.78 be classified as marital property and equitably divided as contemplated by the Commissioner's report and Virginia Code Section 20-107.3. Plaintiff also received 50% of the marital assets in the divorce proceedings.

WHEREFORE, Plaintiff prays for the following relief:

A. That she be awarded attorney fees and costs for the appeal without merit in the Virginia Court of Appeals;

B. That the Court classify the $22,039.78 being held by the Clerk of this Court in Chancery No. 19129-RW as marital property and divide it equally,

C. That an injunction be entered withholding disbursement of aforesaid money until the Court hears and decides this matter.

D. That she be granted such other relief as this cause requires.

Estate of Gladys Louise Barclay

By: /s/ K B Murov
Of Counsel

Kenneth B. Murov, Esq.
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Newport News, VA 23601
757-595-2100
757-595-7199 (fax)

VIRGINIA: IN THE CIRCUIT COURT

FOR THE CITY OF NEWPORT NEWS

LOUISE BARCLAY DAVIS
Plaintiff

v. CHANCERY NUMBER 27095-RF

SAMUEL BUNYAN DAVIS, JR.
Defendant

Serve 40 Barclay Road
Newport News, Va 23606

ORDER

This cause came the 2nd day of November 1996, upon notice of pendente lite relief by plaintiff, plaintiff present and represented by counsel, * the evidence heard ore tenus, and was argued by counsel.

UPON CONSIDERATION WHEREOF AND FOR GOOD CAUSE SHOWN, the following is ADJUDGED, ORDERED, AND DECREED until further order of this Court:

1. That Plaintiff, Louise Barclay Davis, shall have temporary exclusive possession of the marital residence located at 40 Barclay Road, Newport News, Virginia no later than December 1, 1995 with Defendant moving out by November 20, 1995.

2. That both parties shall be prohibited from molesting, harassing or bothering the other.

Exhibit No. 2

3. That both parties shall be enjoined from concealing, transferring, selling or disposing of any assets without written agreement or Court order.

4. That an award of spousal support is reserved in this matter.

5. That a copy of this Order shall be served forthwith on the Defendant, Samuel Bunyan Davis, Jr.

*** the defendant was not present but was duly notified**

Enter this 17th day of November 1995.

/s/ Robert P. Frank
Judge

I ask for this:

/s/ Kenneth B. Murov p.q.
Kenneth B. Murov

(no appearance made p.d.

66611

JONES, BLECHMAN, WOLTZ & kELLY, P.C.
600 Thimble Shoals Boulevard
Newport News, Virginia 23612-2888

HISTORY COMPLAINT INQUIRY CAD8RIF5

COMPLAINT: P951208331
LOC:A 40 BARCLAY RD APT: DCODES: DM ST FRI:2
INFRG:X JOCUR: INVRT: ON8GH: DIST:C1 DIST:B
SEE-CT: Y LICENSE:
VICTIM: ADDRESS: PH:
RPT-BY: LOUISE DAVIS: ADDRESS: PH: 930-3047
REMARKS: ESTRANGED HUSBAND TRES INSIDE
RESD REFUSING TO LEAVE...COMP IS ELDERLY
FEMALE, WILL STBY OUTSIDE

RCVD: 1638 MT: 0502 RO: 0732 RA: 045 DOW: 6

--------UNIT INFORMATION--------

UNIT	DPCH	ARVD	CLRD	--COMP#--
22C1	1645	1700	1850	0276 0000
32C2	1645	1700	1749	0224 0000
02C1	1717	1717	1825	0378 0000
0197	1644	1655	1733	0133 0000
9759	1701	1714	1749	0759 0000

Officers that responded to 40 Barclay Road
December 8, 1996 police Incident #P951208331:

Unit#	Comp#	Name of Officer
22C1	0276	Ira G. Neal, III
32C2	0224	Michael E. Horton
02C1	0378	Jack W. Yundt
0197	0133	Carolyn Phillips
0759	0759	Marc C. Fogleman

Exhibit No. 3

MPI
NED MASSEY 111 PRIVATE INVESTIGATOR
1328 EAST PEMBROKE AVENUE
HAMPTON, VIRGINIA 23669

PROOF OF SERVICE

VIRGINIA SPECIAL PROCESS SERVER

Newport News Circuit Court-Chancery

CASE NO: 700CH9527095F-02
SERVICE NO: 006

Louise Barclay Davis vs., Samuel Bunyan Davis, Jr.
No address

Service on: Samuel Bunyan Davis, Jr.
437 Winterhaven Drive
Newoort News, Virginia 23606

I Ned Massey III am over the age of eighteen (18) years and not a party or otherwise interested in the subject matter in controversy in the action styled Louise Barclay Davis vs. Samuel Bunyan Davis, Jr. in the Circuit Court for the city of Newport News, Virginia.

On Tuesday 7 May 1996 I, Ned Massey III, did post, Notice of Pendente Lite Hearing, Supplemental Notice of Hearing, dated 02 May 1996, Subpoena In Chancery, Bill of Complaint filed 25 July 1995. Posting took place at 11:49 a.m. and Samuel Bunyan was observed with video

Exhibit No. 4

claiming the aforementioned at 11:51 a.m. 7 May 1996.
Video maintained for review upon request.

/s/ Ned Massey III .
Ned Massey III
Special Process Server

State of Virginia
City of Hampton, to wit:

subscribed and sworn to and acknowledged before me this 8 day of May 1996 by Ned Massey III.

/s/ signature unreadable .
Notary
My commission expores: 7/31/99

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

LOUISE BARCLAY DAVIS
Plaintiff

v.

SAMUEL BUNYAN DAVIS, JR.
Defendant

FINAL DECREE OF DIVORCE

This cause came on this day to be heard upon plaintiff's bill of complaint; proper and legal service of defendant; the testimony of witnesses taken on behalf of plaintiff before E. Thomas Cox, Commissioner in Chancery, after proper notice to defendant; the report of the Commissioner in Chancery filed with the court; exceptions filed by defendant; and was argued by counsel for plaintiff and defendant.

UPON CONSIDERATION WHEREOF, it appearing to the Court independently of the admissions of either party in the pleadings or otherwise, that plaintiff and defendant were lawfully married in Newport News, Virginia on September 22, 1956, that both of the parties are of sound mind, over the age of eighteen years and neither of the parties is currently a member of the Armed Forces of the United States on active duty, that plaintiff was and had been an actual bona fide resident and domiciliary of the Commonwsealth of Virginia for more than six months immediately preceding the commencement of this suit on

Exhibit No. 5

August 11, 1995; that at the time of the institution of this suit plaintiff resided in Newport News, Virginia and defendant resided in Newport News, Virginia; that the parties last cohabited as husband and wife in the City of Newport News, Virginia; that there were no children born of the marriage; that the parties separated on June 22, 1995, which separation has been continuous, without interruption and without cohabitation since that time, a period of time in excess of one year; that there is no probability of a reconcilation between the parties; and that the plaintiff is entitled to the relief prayed for.

It is, accordingly, ADJUDGED, ORDERED and DECREED that the report of E. Thomas Cox, Commissioner in Chancery, be and it is hereby approved, ratified and confirmed in all respects; and it is further

ADJUDGED, ORDERED and DECREED that defendant's exceptions to the Commissioner's Report filed herein are hereby overruled, and it is further

ADJUDGED, ORDERED and DECREED THAT plaintiff LOUISE BARCLAY DAVIS hereby is granted a divorce from the bonds of matrimony from defendant SAMUEL BUNYAN DAVIS, JR. on the ground that the parties have lived separate and apart, without cohabitation and without interruption, for a period of time in excess of one (1) year; and it is further

ADJUDGED, ORDERED and DECRFEED that Defendant shall pay to Plaintiff spousal support in accordance with the court's order of June 17, 1996 in the amount of SIX HUNDRED DOLLARS ($600.00) per month, commencing May 10, 1996 and continuing on the 10th day of each month thereafter until her death,

remasrriage or further Order of the Court, whichever first occurs; and it is further

ADJUDGED, ORDERED and DECREED that Kenneth B. Murov be appointed Special Commissioner and/or Trustee to convey all right, title and interest in the marital home located at 40 Barclay Road, Newport News, Virginia from Plaintiff and Defendant to Plaintiff; and it is further

ADJUDGED, ORDERED and DECREED that Kenneth B. Murov be appointed Special Commissioner and/or Trustee to convey all right, title and interest in the real estate located at 437 Winterhaven Drive, Newport News, Virginia from Plaintiff and Defendant to Defendant; and it is further

ADJUDGED, ORDERED and DECREED that Kenneth B. Murov be appointed Special Commissioner and/or Trustee to sell and transfer ownership of the real estate located at 628 Lee Street, Hampton, Virginia, 515 Homestead Avenue, Hampton, Virginia and 10368 Warwick Boulevard, Newport News, Virginia. Upon the sale of the properties listed above, the net proceeds shall be equally divided between Plaintiff and Defendant after payment of tax liens and all expenses of sale; and it is further

ADJUDGED, ORDERED and DECREED that the **(three bonds) face** **Dollars plus interest** bearer bonds in the amout of **Fifteen thousand & xx/100** shall be cashed and the net proceeds split equally between Plaintiff and Defendant, but Defendant's share shall be reduced by all unpaid spousal support in arrears and all

expenses and fees to which Plaintiff is entitled in this cause; and it is further

ADJUDGED, ORDERED and DECREED that Plaintiff and Defendant comply with the provisions set forth hereinbelow pursuant to Section 20-60.3, Code of Virginia (1950), as amended, and notice is given that

1. Any support payments may be witheld as they become due pursuant to Section 20.79.1 or Section 20.79.2 from earnings as defined in Section 63.1-250 without further amendments of this order or having to file an application for services with the Department of Social Services; however, absence of such notice in an Order entered prior to uly 1, 1988, shall not bar withholding of support payments pursuant to Section 20.79.1: that plaintiff be allowed to resume her maiden name of GLADYS LOUISE BARCLAY.

Nothing further remaining to be done in this matter, it is ORDERED stricken from the docket and filed among the ended causes.

ENTERED this 10th day of April, 1997.

/s/ James C. Godwin
Judge

I ask for this:

/s/ Kenneth B. Murov p.q.
Kenneth B. Murov

Have Seen:

No appearance by Defendant
(unrepresented p.d. **4/10/97**
Samuel Bunyan Davis, Jr. **JCG**

Office of Discreet Inquiry
1328 East Pembroke Avenue
Hampton, Virginia 23669
Business License 11-1722

MPI

PROOF OF SERVICE

STYLE. Davis v Davis . CASE #. 27095 .
VIRGINIA:IN THE CIRCUIT COURT FOR THE
CITY OF NEWPORT NEWS
SERVED: SAMUEL BUNYAN DAVIS, JR.
437 WINTERHAVEN DRIVE
NEWPORT NEWS, VA 23606

is the name and address of the person upon whom service of the following is to be made

( ) Notice of Motion for Judgment and
Motion for Judgment
( ) Subpoena in Chancery and
Bill of Complaint
( ) **.Notice and Motion for Relief .**

I am a private process server. I am over the age of eighteen years and not a party to or otherwise interested in the subject matter in controversy in this case. I served, as shown below, the above-named person upon whom services of process was to be made with copies described above

Exhibit No. 6

Date and time of service. **18 Sept 1998 5:05 pm** .
Place of service. **Riverside Hosp Rm# 439**
Newport News, Va.
Method of service. **xxx** . Other. _____ .

. 21 Sept 1998 . **/s/ Ned Massey III** .
Date Signature Ned Massey III

NOTARY

Name (Type or Print). **Stephanie M. Cain** .
State of Virginia City County of. **Hampton** .
Subscribed and sworn to affirmed bdfore me
this date by. **Ned Massey III** .

. 21 Sept 1998 . **/s/ Stephanie M. Cain** .
Date Signature Stephanie M. Cain
My commission expires. **31 Jan 2002** .

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

LOUISE BARCLAY DAVIS,
and the Estate of Gladys Louise Barclay,
successor in interest
Plaintiff

v. IN CHANCERY
NO.27095

SAMUEL BUNYAN DAVIS, JR.
Defendant

MOTION TO QUASH MOTION FOR RELIEF

NOW COMES, Samuel Bunyan Davis, Jr. and moves the court to Quash the Motion for Relief for the following reasons:

1. That the matters contained in the Motion are on appeal to the United States Supreme Court.
2. Patricia W. Fromal has recently, October 2, 1998 been appointed Co-trustee of Virginia Real Estate Trust and request time to become acquainted with the nature of the action and acquire representation.
2. All matters pertaining to Samuel Bunyan Davis, Jr. should be continued until Samuel Bunyan Davis, Jr. Is released from doctors care. Whereby Samuel Bunyan Davis, Jr. Is undergoing recovery from surgery, pneumonia and currently hospitalized.

Filed
10/5/97
No appearance . Samuel Bunyan Davis, Jr. .
no Drs certificate Samuel Bunyan Davis, Jr.
nothing to cause continuance
other than mere allegation **Exhibit No. 7**

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

GLADYS LOUISE BARCLAY,
and the Estate of Gladys Louise Barclay,
successor in interest
Plaintiff

v. In Chancery No. 27096

SAMUEL BUNYAN DAVIS, JR.
Defendant

ORDER

THIS CAUSE came the 5th day of October 1998 upon Plaintiff's notice and motion for relief, personal service of said notice upon Defendant, Plaintiff's counsel present, the evidence heard ore tenus and was argued by counsel for Plaintiff.

IT APPEARING to the Court, as follows:

1. That Louise Barclay Davis died on November 14, 1997 after assuming her maiden name of Gladys Louise Barclay in the Final Decree of Divorce.

2. That Gladys Louise Barclay having died intestate, Kenneth B. Murov and John Churchill qualified in the Circuit Court of the City of Newport News as Co-Administrators of her estate.

Exhibit No. 8

UPON CONSIDERATION WHEREOF and for good cause shown, the following is ADJUDGED, ORDERED and DECREED

1. That Kenneth B. Murov and John Churchill as Co-Administrators of the Estate of Gladys Louise Barclay, successor in interest to Louise Barclay Davis, are hereby substituted as Plaintiffs in this cause.

2. That Plaintiffs' and Defendant's interest in the assets of the Virginia Real Estate Trust having previously been determined to be 50/50, Plaintiffs shall be entitled to 50% of the $8,710.83 held by the Clerk of the Circuit Court of the City of Hampton, but it is Ordered that the entire sum of $8,710.83 shall be disbursed to Kenneth B. Murov and John Churchill as Administrators of the Estate of Gladys Louise Barclay as set forth in the Accounting approved in paragraph five hereinbelow.

3. That Plaintiffs' request for attorney fees having been granted by the November 18, 1997 order of the Court of Appeals of Virginia in this cause, Plaintiffs are awarded attorney fees from Defendant in the amount of $672.00.

4. That Kenneth B. Murov is appointed special Commissioner and/or Trustee to convey all right, title and interest in and to the right of way adjacent to that real estate located at 40 Barclay Road, Newport News, Virginia, formerly owned by Louise Barclay Davis. This provisions (sic) shall be effective shall be effective nunc pro tuncto the entry of the final decree in this cause, April 10, 1997.

5. That the Accounting attached hereto as Exhibit A is hereby approved, and to satisfy the liabilities owed by Defendant, Kenneth B. Murov and John Churchill as Administrators of the Estate of Gladys Louise Barclay shall have the authority, power, and right to receive the assets set forth on Exhibit A to the extent said assets are required to satisfy Defendant's obligations set forth on Exhibit A. Co-Administrators Murov and Churchill shall also be entitled to receive from Defendant's share of any proceeds from the sale of 628 Lee Street, Hampton, Virginia, 515 Homestead Avenue, Hampton, Virginia, 10368 Warwick Boulevard, Newport News, Virginia, and any interest of Defendant in the assets of the Virginia Real Estate Trust, such monies as may be required to satisfy obligations Defendant owes to Plaintiffs included but not limited to storage fees fees incurred by Plaintiffs for Defendant's personal property and similiar expenses. Plaintiffs shall provide written notice to Defendant of the deduction of such expenses from Defendant's share of the aforesaid proceeds and/or assets.

6. in that the final decree of divorce allocated personal property and household furnishings between the parties and in that Defendant has refused to retrieve his personal property notwithstanding written notice to him from Plaintiffs, Plaintiffs shall have the authority to advise Defendant in writing that unless he retrieves his personal property from the storage facility where it is currently store (sic),Plaintiffs shall be entitled to deliver said property to Defendant's residence provided Plaintiffs provide Defendant with written notice of the time such property shall be delivered. Plaintiffs shall be relieved of any responsibility for the aforesaid property property provided Plaintiffs comply with the provisions of this order.

7. That consistent with the final decree in thiscause appointing Kenneth B. Murov as Special Commissioner

and/or Trustee to convey the property located at 628 Lee Street, Hampton, Virginia and 10368 Warwick Boulevard, Newport News,the execution by Kenneth B. Murov of contracts to sell the aforesaid property are hereby approved and ratified. Said contracts are attached hereto as Exhibits B and C.

In addition, Kenneth B. Murov is authorized to execute and deliver the deeds to the aforesaid property. Such deeds are attached hereto as Exhibits D and E.

8. That due to the necessity of bringing this cause, Plaintiffs are awarded attorney fees from Defendant in the amount of . $500.00 . and fees to be satisfied out of Defendant's share of the assets enumerated in paragraph five hereinabove.

9. This cause shall remain on the docket for such action as this cause may require including the ratification and approval of a contract of sale for 515 Homestead Avenue, Hampton, Virginia, and authorization and for execution and delivery of the aforesaid property.

Entered this . 7th . day of . November . 1998

/s/ James C. Godwin .
Judge

I ASK FOR THIS:

/s/ Kenneth B. Murov .p.q.
Kenneth B. Murov, Esq.
JONES, BLECHMAN, WOLTZ & KELLY,P.C.
600 Thimble Shoals Boulevard
P. O. Box 12888
Newport News, Virginia 23612

Telephone (757) 873-8049

HAVE SEEN:

NO APPEARANCE BY DEFENDANT .p.q.

Jones, Blechman, Woltz & Kelly, P.C.
Attorneys and Counselors at Law
600 Thimble Shoals Boulevard
Newport News, Virginia
January 26, 1999

R
Call Murov
shouldnt the
designated Judge
deal w/ this.

Mr. Rex A. Davis, Clerk
Newport News Circuit Court
2500 Washington Avenue
Newport News, Virginia 23607-1307

Called 2/4/98
& left
message on
recorder

Re: Davis v. Davis
Chancery No. 27095

Dear Mr. Davis:

Enclosed please find my firm's check in the amount of $19.00 which represents the amount necessary to reinstate this matter. I have also enclosed an Order, which I would appreciate your presenting to the Judge for entry in the above referenced matter. Please forward a certified copy of the Order to me upon entry. If you should have any questions, please do not hesitate to contact me.

With best personal regards, I remain

Very truly yours,

Kenneth B. Murov

KBM/lrc
Enclosure

Exhibit No. 9

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

LOUISE BARCLAY DAVIS,
and the Estate of Gladys Louise Barclay,
successor in interest

Plaintiff

v. Chancery No. 27095

SAMUEL BUNYAN DAVIS, JR.

Defendant

Serve: James C. Godwin, Judge Designate
708 North Broad Street
Suffolk, Virginia 23434

PETITION FOR WRIT OF PROHIBITION

Now comes the Defendant, Samuel Bunyan Davis, Jr. pro se and moves the Court for a Writ of Prohibition directed to the Honorable James C. Godwin prohibiting him from holding a hearing on the NOTICE AND MOTION in the above styled suit scheduled for December 3, 1999 at 2:00 p.m. and says as follows:

1. That a final decree in the above styled cause was signed by the Honorable James C. Godwin and entered on April 10, 1997 and contains the following language:

"Nothing further remaining to be done in this matter, it is ORDERED stricken

Exhibit No. 10

from the docket and filed among the ended causes.

2. Plaintiff alleges the non-disclosure of Defendant's interest in certain sums in Simmons v. Davis Chancery No. 19129RW now pending in this Court.

3. Defendant filed an answer to a Subpoena Duces Tecum in which the funds in Simmons v. Davis are specifically identified which was sworn and subscribed to. An original was sent to Mr. Kenneth Murov and a copy filed with the court on December 4, 1996. A copy of the certified copy filed with the court is attached hereto. (Exhibit No. 1) In addition to the answer to the Subpoena Duces Tecum, plaintiff had full knowledge of the pending suit, *Simmons v. Davis* and make no claim that the funds were or had ever been marital property. On January 31, 1997 defendant filed an objection to the Commissioner in Chancery report, which was filed with the Court and mailed to Mr. Kenneth Murov, Counsel for the Plaintiff at 600 Thimble Shoals Boulevard, P. O. Box 12888, Newport News, Virginia 23612-2888, which is his address of record with the Virginia State Bar and such objection states:

....3. The report of the Commissioner does not address the approximately $75,000 held by this court in a suit styled McKinley Simmons v. S. B. Davis, Jr. (See Exhibit No. 2)

4. Rule 1.1 of the rules of the Supreme Court states as follows:

"All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the

control of the trial court and subject to be modified, vacated, or suspended for twenty-one daysasfter the date of entry, and no longer.....The date of entry shall be the date the judgment, order, or decree is signed by the judge."

5. Defendant maintains that the only way a suit may be reopened is when fraud has been committed as allowed by the Code of Virginia @ 8.01-428, which is inapplicable to the defendant in this case.

6. A copy of this petition is whereby being forwarded to the Supreme Court of the United States as an exhibit to an application for a Writ of Certiorari now pending before said Court involving the penetration of the Virginia Real Estate Trust as identified in the OBJECTION TO REPORT FILED jANUARY 31, 1997. (sEE EXHIBIT nO. 2)

WHEREFORE this defendant prays that a Writ of Prohibition be issued against the Honorable James C. Godwin.

Respectfully submitted,

Samuel Bunyan Davis, Jr.

Samuel Bunyan Davis, Jr. pro se
437 Winterhaven Drive
Newport News, Virginia 23606
(757) 930-8733

CERTIFICATE OF SERVICE

i HEREBY CERTIFY THAT ON THE ___ DAY OF nOVEMBER, 1999 i DEPOSITED A COPY OF THE FOREGOING pETITION IN THE u. s. mAIL TO kENNETH b. mUROV p. o. bOX 12888 nEWPORT nEWS, vIRGINIA 23612-12888.

_____
Samuel Bunyan Davis, Jr.

STATE OF VIRGINIA

I hereby certify that on the ____ day of December, 1999 personally appeared before me _____Notary Public Samuel Bunyan Davis, Jr. who being first duly sworn, stated that all information in the foregoing Petition is true and accurate to the best of his knowledge and belief.

_____
Notary Public

Mr. commission expires_____

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

LOUISE BARCLAY DAVIS,
and the Estate of Gladys Louise Barclay,
successor in interest

Plaintiff

v. Chancery No. 27095

SAMUEL BUNYAN DAVIS, JR.

Defendant

PETITION FOR WRIT OF PROHIBITION

Now comes the Defendant, Samuel Bunyan Davis, Jr. pro se and moves the Supreme Court of Virginia for a Writ of Prohibition directed to the Honorable James C. Godwin, prohibiting him from entering an order on a hearing held on December 3, 1999 on the above styled case and says as follows:

1. That a final decree in the above styled cause was signed by the Honorable James C. Godwin and entered on April 10, 1997 and contains the following language:

"Nothing further remaining to be done in this matter, it is ORDERED stricken

Exhibit No. 11

from the docket and filed among the ended causes."

2. Rule 1.1 of the Rules of the Supreme Court states as follows:

"All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one daysasfter the date of entry, and no longer.....The date of entry shall be the date the judgment, order, or decree is signed by the judge."

3. Defendant maintains that the only way a suit may be reopened is when fraud has been committed as allowed by the Code of Virginia @ 8.01-428, which is inapplicable to the defendant in this case.

4. That a timely objection to the holding of the hearing was made to the Honorable Rex A. Davis, Clerk of Court on the grounds that Judge Godwin's appointment expired twenty-one days after entry of the FINAL DECREE OF DIVORCE (Exhibit No. 1).

5. That a timely objection to the holding of the hearing was made to the Honorable James C. Godwin on the grounds that his appointment expired twenty-one days after entry of the FINAL DECREE OF DIVORCE.

6. A copy of this petition is being forwarded to the Supreme Court of the United States as an exhibit to an application for a Writ of Certiorari.

WHEREFORE this defendant prays that a Writ of Prohibition be issued against the Honorable James C. Godwin.

Respectfully submitted,

Samuel Bunyan Davis, Jr.

Samuel Bunyan Davis, Jr. pro se
437 Winterhaven Drive
Newport News, Virginia 23606
(757) 930-8733

CERTIFICATE OF SERVICE

I hereby certify that on ____ day of December, 1999 I deposited a copy of the foregoing Petition in the U. S. Mail to Kenneth B. Murov P. O. Box 12888 Newport News, Virginia, 23612-2888, and a copy of the foregoing Petition to the Hon. James C. Godwin at (1) 708 North Broad Street, Suffolk, Virginia 23434 and (2) 1 Long Point Lane, Suffolk, Virginia 23434.

By:_____
Samuel Bunyan Davis, Jr.

STATE OF VIRGINIA

I hereby certify that on the ___ day of December, 1999 personally appeared before me, _____ Notary Public Samuel Bunyan Davis, Jr., who being first duly sworn stated that all informationation in the foregoing Petition is true and accurate to the best of his knowledge and belief.

_____
Notary Public

My commission expires: _____

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS

LOUISE BARCLAY DAVIS
now the ESTATE OF GLADYS LOUISE BARCLAY
successor in interest

Plaintiff

v. CHANCERY NO.: 27095-rf

SAMUEL BUNYAN DAVIS, JR.

Defendant

ORDER

THIS CAUSE came the 3rd day of December, 1999 upon Plaintiff's notice and motion to classify $96,959.17 and other property held by the Clerk of the Circuit Court of the City of Newport News as marital property and then equitably divide said property by allocating 50% of the aforesaid cash and other property to Plaintiff , personal service of Defendant, Defendant's motion to disqualify the Honorable James C. Godwin, Defendant's motion to disqualify counsel for Plaintiff, Defendant present and appearing pro-se, Plaintiff's counsel present, the evidence heard ore tenus, and was argued by counsel for Plaintiff and by Defendant individually.

It Appearing to the Court that the following facts have been established:

1. That $96,959.17 is being held by the Clerk of the Circuit Court of the City of Newport News in Chancery #19129-RW.

Exhibit No. 12

2. That the aforesaid money and other property thatis the subject matter of Chancery #19129-RW accrued before the separation of Plaintiff and Defendant on June 22, 1995.

3. That prior to the hearing the Defendant has made no appearance at any hearings including the Commissioner's hearing and the hearing to enter the final decree in this cause.

4. That Defendant failed to answer the Interrogatives propounded in this cause and failed to comply with the Request for Production, and therefore failed to identify the $96,959.17 and other property in Chancery #19129-RW as marital property in the divorce suit thereby denying Plaintiff an opportunity to seek to classify said property as marital property and to seek equitable distribution of said property.

5. That the Commissioner's Report was ratified, comfirmed, and approved in all respects in the final decree of divorce, and specifically required Defendant on page 8 to provide an accounting of certain assets so that the same could be valued for purposes of equitable distribution, and Defendant heretofore has not complied with this requirement.

UPON CONSIDERATION WHEREOF and for good cause shown, the following is ADJUDGED, ORDERED, AND DECREED:

A. The $96,959.17 held by the Clerk of the Circuit Court of the City of Newport News in Chancery #19129-RW is classified as marital property arising out of the marriage of Plaintiff and Defendant, said property is

subject to equitable distribution pursuant to Virginia Code Section 20-107.3 and the Court having considered the statutory factors set forth in Virginia Code Section 107.3E as noted in the Commissioner's Report herein, the Clerk of the Circuit Court of the City of Newport News shall disburse said money as follows: to the Estate of Gladys Louise Barclay the cash amount of $48,479.58, and to Defendant Samuel B. Davis, Jr. the cash amount of 48,479.59.

B. That any other property not yet liquidated in Chancery #19129-RW is also classified as marital property arising out of the marriage of Plaintiff and Defendant, said property is subject to equitable distribution pursuant to Virginia Code Section 20-107-3 as noted in the Commissioner's report herein, any other property in Chancery #19129-RW not yet liquidated shall be divided equally between Plaintiff and Defendant.

C. Plaintiff's request for attorney fees and costs is denied.

D. Defendant's motion to disqualify the Honorable James C. Godwin is denied.

E. Defendant's motion to disqualify counsel for Plaintiff is denied,

ENTERED this . 6th . day of . January . 2000.

. James C. Godwin .

I ask for this:

. Kenneth B. Murov . p.q.
Kenneth B. Murov, Esquire
JONES, BLECHMAN, WOLTZ & kELLY, P.C.
600 Thimble Shoals Boulevard
Newport News, Virginia 23606
Telephone: (757) 873-8048
Facsimile: (757) 873-8103

Have Seen:

_____p.q.
Samuel B. Davis, Jr.
Pro se
437 Winterhaven Drive
Newport News, VA 23606

192615.1

VIRGINIA RULES ANNOTATED

Rule 1.1. Finality of Judgments, Orders and Decrees.

All judgments, orders, and decrees, irresoective of terms of court, shall remain under control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits herinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

Exhibit No. 13

VIRGINIA

In the supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 5th *day of* March, 2001.

Samuel Bunyan Davis, Jr. Appellant,

Against Record No. 003038
Court of Appeals No. 0271-00-01

Louise Barclay Davis, etc. Appellee

From the Court of Appeals of Virginia

Finding that the petition for appeal does not contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value, the Court dismisses said petition filed in the above styled case. Rule 5:17(c).

A copy,
Teste:
David B. Beach,
Clerk

By: /s/ Jenifer G. Earl
Deputy Clerk

Exhibit No. 14

Rule 5:17. Petition for Appeal

(a) Time for filing. -- In every case in which the appellate jurisdiction of this Court is involved, a petition for appeal must be filed with the clerk of this Court:

(1) in the case of an appeal direct from a trial court, not more than three months after entry of the judgment appealed from; or

(2) in the case of an appeal from the Court of Appeals, within 30 days after entry of the judgment appealed from or a denial of a petition for rehearing.

(b) Copy to Opposing Counsel. -- At the time the petition for appeal is filed, a copy of the petition shall be served on counsel for the appellee.

(c) Form and Content. -- Under a separate heading entitled "Assignments of Error," the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this Court. Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court. An assignment of error which merely states that the judgment

Exhibit No. 15

or award is contrary to the law and the evidence is not sufficient. If the petition for appeal does not contain assignments of error, the appeal will be dismissed.

Under aaother separate heading entitled "Questions Presented," the petition shall list the questions upon which the appellant intends to submit argument, with a clear and exact reference to the particular assignment of error to which each question relates.

Where appeal is taken from a judgment of the Court of Appeals in a case where judgment is made final under Code @ 17.1-417, the petition for appeal shall contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value. If the petition for appeal does not contain such a statement the appeal will be dismissed.

The petition also shall contain:

(1) A subject index and table of citations with cases alphabetically arranged. Citation to Virginia cases shall be to the Virginia Reports and the Southeastern Reporter. Citation of all authorities shall include the year thereof.

(2) A brief statement of the nature of the case and of the material proceedings in the trial court or commission in which the case originated. This statement shall omit references to any paper filed or action taken that does not relate to the assignments of error.

(3) A clear and concise statement of the facts that relate to the assignments of error, with reference to the

pages of the record, where there is any possibility that the appellee may question the statement. Any quotation from the record should be brief. When the facts are in dispute, the petition shall so state. The testimony of individual witnesses should not be summarized seriatim unless the facts are in dispute and such a summary is necessary to support the appellant's version of the facts.

(4) The principles of law, the argument, and the authorities relating to each assignment of error, with each assignment of error, the principles, the argument, and the authorities shall be stated in one place and not scattered through the petition. At the option of counsel, the argument may be preceded by a brief summary.

(5) A short conclusion stating the precise relief sought.

Four copies of this petition shall be filed. Carbon copies are acceptable. Except by leave by a justice of this Court a petition for appeal shall not exceed 35 typed or 25 printed pages.

(d) Single Petition in Separate Cases. -- Whenever two or more cases were tried together in the court or commission below, one petition for appeal may be used to bring all such cases before this Court even though the cases were not consolidated below by formal order.

(e) Required Certificate. -- The appellant shall include within the petition a certificate stating:

(1) the names of all appellants and appellees, the names, addresses, and telephone numbers of counsel for each party, and the address and telephone number of any party not represented bycounsel.

(2) that a copy of the petition for appeal has been mailed or delivered on the date stated therein to all opposing counsel and all parties not represented by counsel.

(3) in a criminal case, a statement whether counsel for defendant has been appointed or privately retained; and

(4) whether he desires to state orally to a panel of this court the reasons why his appeal should be granted, and, if so, whether he wishes to do so in person or by conference telephone call.

SUPREME COURT OF VIRGINIA

RECORD NO._____

SAMUEL BUNYAN DAVIS, JR.

Appellant

v.

LOUISE BARCLAY DAVIS,
Now the Estate of Gladys Louise Barclay
Successor in Interest

Appellee

Appeal from the Court of Appeals of Virginia

PETITION FOR APPEAL

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Exhibit No. 16

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ASSIGNMENTS OF ERROR/ QUESTIONS PRESENTED

1. In the absence of fraud upon the Court, can a case be reopened after the
expiration of twenty-one days after entry of the final decree (Rule 1.1 of the Supreme Court of Virginia) for the purpose of taking evidence on property that was available during trial? When the final order in a divorce contains no provision for bifurcation on the matter of Equitable Distribution can Appellee then bring matters of Equitable Distribution before the court. When improper allocation of assets has been made due to lack of investigation and the gathering of evidence and no bifurcation has been made on Equitable Distribution is the decree of divorce then void?

2. What was the basis for reopening this case to make property belonging
to Virginia Real Estate Trust available for payment of attorneys fees? In September, 1998 this was done with Appellant hospitalized and being refused a timely request for a continuance based on said hospitalization. In the absence of fraud upon the Court, can a case be reopened after the expiration of twenty-one days after entry of the final decree (Rule 1.1 of the Supreme Court of Virginia) for the purpose of taking evidence on property that was available during trial? No order from said hearing was ever served or mailed to Appellant.

3. Will Appellant be allowed to re-open this case to have heard and determined matters of fraud by Kenneth B. Murov in the assessment of punitive damages in (a) representing to the Court that the marital residence at 40 Barclay Road was built on property owned by wife before marriage (b) representing to the Court that Appellant and wife were the sole owners of Virginia Real Estate Trust, knowing that there were other shareholders (c) representing

to the Court that three bearer bonds were gifts from Appellant to wife, knowing Appellant had accused wife of stealing the bonds (d) fraud as co-administrator of wife's estate in handling jewelry not her own in wife's possession at her death and (e) fraud as co-administrator of wife's estate in handling a bond registered to Louise D. Haynes, the aunt of Appellant.

4. The primary issue has now become one of Equal Protection under the law as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States. This violation of Equal Protection occurs due to the refusal of the Court of Appeals to abide by its' own decisions made after the entry of the Final Decree of divorce in reference to Equitable Distribution. Cases clearly in point require that the final decree be voided.

STATEMENT OF THE CASE

This appeal comes to the Supreme Court of Virginia for the second time from a second order of the Court of Appeals of Virginia (Exhibit No. 1 App pg 1) denying relief from a second final order of the Circuit Court for the City of Newport News (Exhibit No. 2 App pg 5) and an order of the Court of Appeals of Virginia denying a petition for an *en banc* hearing (Exhibit No. 3 App pg 8). The first Final Decree of Divorce (Exhibit No. 4 App pg 9) was appealed to the Court of Appeals of Virginia, the Supreme Court of Virginia and application was made to the Supreme Court of the United States for a Writ of Certiorari. This application was denied and a petition for a rehearing was pending when the suit was reopened. The application to the Supreme Court of the United States is in an indeterminate status as the same case makes its' way through the courts of the Commonwealth of Virginia.

While this appeal is from the order entered on the reopened case it must of necessity embrace all actions from its' inception. The Court of Appeals ruled against Appellant on the first appeal. The reopening of the suit exposed it to decisions of the Court of Appeals made after the first one which clearly show Appellant is entitled to relief. The order denying an *en banc* hearing artfully states that the order is not in conflict with "prior" decisions of the court. The law did not change; the interpretation by the Court of Appeals did. Now the Court of Appeals is refusing to abide by its' own decisions.

The Bill of Complaint (Exhibit No. 5 App pg 13) was filed in the Circuit Court for the City of Newport News on July 25, 1995. Appellant is an attorney admitted to the bar in 1952. Plaintiff knew that if Appellant was

personally served with process he would file a cross-bill and vigorously contest the matter. At the request of Kenneth B. Murov Judge Robert P. Frank scheduled a hearing for November 2, 1995. A recitation of a series of events might explain why Murov felt compelled to have a hearing knowing there had been no personal service of process. Appellant's wife suffered a severe head injury in an automobile accident in October 1988. Indicative of its' seriousness is that Appellant secured a settlement for her in the amount of $282,000. Appellant was engaged in attempting to expose the corruption surrounding David Murray, the lawyer who stole $42 million dollars. Appellant spent large sums running ads in *The Washington Post* about the scandal. Appellant used none of wife's money in this endeavor, financing it from money inherited from his aunt. Two elements worked on her: her sisters who stood to inherit if she divorced and persons intent on stopping exposure of the Murray scandal. Together they convinced her that Appellant was mentally ill, would spend all their money and the only way for him to get help was to have him committed. On the early morning of June 22, 1995 as instructed she called 911 for police to come and hold Appellant until a person from Contact could come and evaluate Appellant for committment. Two female police officers arrived shortly after 6:00 a.m. When the police officers saw that Appellant posed no threat they refused to stay until after 8:00 when the Contact office opened. The officers agreed to stay until her sister Leila B. Hine came to take her away. Appellant lived alone in the marital residence from that date; wife lived at Riverside Convalescent Center in Smithfield. Subsequently Appellant published in *The Daily Report* a transcript of a prior 911 call on June 18, 1995 and later a transcript of the June 22, 1995 call. The hearing on November 2 was held as scheduled. There was no proof of service of any kind in

the file. On November 5, 1995 Judge Frank wrote the Supreme Court of Virginia stating that all judges of the circuit had recused themselves and asked for appointment of a substitute. On November 17, 1995 Judge Frank entered an order based on the hearing (Exhibit No. 6 App pg 17). On December 8, 1995 wife's attorney, Kenneth B. Murov stage a five-unit police raid on Appellant's residence. Appellant asked the police through the door if they had a warrant and the reply was "We have a court order".

Still fearing action by Appellant if he was personally served, Murov solved the problem by having the Bill of Complaint posted and video-taping Appellant removing it from the door (Exhibit No. 7 App pg 19). Judge James C. Godwin ruled that this was personal service. Despite raising the question at every opportunity no court has ruled on this issue. The matter was referred to E. thomas Cox, Commissioner in Chancery. The Bill of Complaint requested Equitable Distribution. Cox neglected his duty to make a full and sufficient inquiry into the assets of the parties and the contributions both made. He issued a report that was woefully incomplete. Appellant objected to the commissioner's report (Exhibit No. 8 App pg 20) which was overruled. Notwithstanding, Judge Godwin entered the Final Decree of Divorce over the objection of Appellant (Exhibit No. 9 App pg 22). The Final Decree of Divorce was appealed to the Court of Appeals of Virginia, the Supreme Court of Virginia and the Supreme Court of the United States. While this latter appeal was pending the case was reopened on behalf of the estate of Appellant's late wife to get half of $96,959.17 held by the court in Simmons v. Davis. Judge Godwin awarded the estate one-half. It is this last action that brings this case before the Court.

STATEMENT OF FACTS

The case at bar was originally brought by Louise Barclay Davis on July 25, 1995 as an action for divorce. Without service the first Order in the case was entered by the Circuit Court of Newport News on November 17, 1995 in violation of the Virginia Law and of Appellant's civil rights. (Order: Exhibit No. 6 App pg 17) Without service a substitute Judge entered the case and a Commissioner in Chancery was appointed who divided the property of a forty year marriage without regard to the Virginia Law on Equitable Distribution. The suit was filed on July 25, 1995 and no form of service was obtained until May 7, 1996 when the Bill of Complaint was posted on Appellant's front door and Appellant video-taped removing it. There is no court order declaring video-taping as personal service but the case proceeded as if it had been approved, raising the question if it had been approved by Judge Godwin in advance. The case was referred to E. Thomas Cox, a Commissioner in Chancery who took evidence and submitted a report to the Court (Exhibit No. 10 App pg 23). The Final Decree of Divorce was entered on April 10, 1997 over the objection of Appellant (Exhibit No. 9 App pg 22). It concludes "Nothing further remaining to be done in this matter, it is ORDERED stricken from the docket and filed among the ended causes".

1. Notice was served on Appellant that the Estate of Gladys Louise Barclay would move the Court on December 3, 1999 for one-half of the $96,959.17 held by the Court in the suit Simmons v. Davis, Chancery No. 19129-RW. On November 30, 1999 a Petition for a Writ of Prohibition was mailed to the Supreme Court of Virginia and served personally on Judge James C. Godwin (Exhibit No. 11 App pg 37). On December 3, 1999, over the objection of Appellant, Judge Godwin overruled and held

the hearing. On December 6, 1999 a second Petition for a Writ of Prohibition was mailed to the Supreme Court of Virginia, but without service on Judge Godwin. On January 5, 2000 a third Petition for a Writ of Prohibition was mailed to the Supreme Court of Virginia, this time showing service of process by posting on Judge Godwin's front door that same day. On January 29, 2000 an order was received by first class mail in an envelope of Rex A. Davis, Clerk of Court. This order is signed by Judge Godwin and is dated January 6, 2000. This order does not bear the Clerk's time stamp showing when it was received and entered in the record in his office (Exhibit No. 12 App pg 41). The ten days for rehearing and the twenty-one jurisdictional days having run before receipt of the order Appellant filed this appeal on February 3, 2000.

On February 3, 2000 in the mail after the filing of the appeal Appellant received a check from Rex A. Davis, Clerk in the amount of $48,479.58 (Exhibit No. 13 App pg 44) without explanation. Appellant received three orders from the Supreme Court of Virginia dated March 11, April 11 and April 11, 2000 dismissing the three Writ of Prohibition petitions.

2. Appellant was admitted to Riverside Hospital on September 10, 1998 was operated on September 12th and remained in the Intensive Care Unit until September 18, 1998 at 4:30 p. m. when he was moved to Room 439. Notice and Motion for Relief was served on Appellant on September 18, 1998 in Room 439 at 5:05 p. m. (Exhibit No. 14 App pg 45) by Ned Massey who charged and was paid $868.65 from proceeds from the sale of VRET property by Kenneth B. Murov for this service of process.

By letter of September 29, 1998 (Exhibit No. 15 App pg 46) Patricia H. Alston, Deputy Clerk of Court wrote a letter to Judge Godwin saying she is enclosing (a) a Notice and Motion for Relief (b) a Motion to Reinstate and (c) an Order reinstating the matter on the docket. The letter

also indicated that a stamped, self-addressed envelope was enclosed for his convenience. Neither the judge or clerk of the circuit court has authority to reinstate any case for which the final order has been issued. The authority to reinstate lies only in cases that have been removed from the docket under the two year rule and before the five year mandatory five year removal. Reinstatement under this rule requires notice to the parties. Not only did Appellant not receive notice of an application for reinstatement, there is no motion for reinstatement in the file. Appellant never received copy of an Order reinstating the matter on the docket on which he could file objection.

While Appellant was still hospitalized, still quite physically incapacitated and having been served a Notice for hearing on October 5, 1998, on October 2, 1998 a Motion to Quash Motion for Relief was filed (Exhibit No. 16 App pg 47) and hand delivered to Kenneth B. Murov stating (1) that the matter is on appeal to the United States Supreme Court (2) that Patricia W. Fromal has been appointed Co-trustee of Virginia Real Estate Trust and (3) that the matter should be continued because of Appellant's hospitalization. On October 5, 1998 Judge Godwin wrote across the bottom of a copy of the Motion to Quash "no appearance no Drs certificate nothing to cause continuance other than mere allegations" (Exhibit No. 17 App pg 49). Appellant obtained copies from the circuit court records of two orders. Both orders are for reinstatement of the case on the docket neither having a stamp as to when it was received by the clerk. The first is dated October 5, 1998 and bears the notation in handwriting across the bottom "Original mailed to Judge Godwin 9-29-98" The second is dated October 26, 1998. Both of these orders have a second page on which the only entry is "I ask for this" and the signature of Kenneth B. Murov. There is more than enough room for this on the first page. It is also interesting to note that each of these

second pages bear -4- at the bottom of each of the second page. On November 9, 1998 Judge Godwin entered an order (Exhibit No. 18 App pg 50) based on the hearing. The only order on which the fee for reinstatement has been paid is the one dated March 24, 1999. There is no reappointment of Judge Godwin as suggested by Mr. Murov at the hearing held December 3, 1999 Unlike the first two, the third order of reinstatement has a cover letter citing an enclosure of a check for $19.00 for the cost of reinstatement with a notation by the clerks office that $9.00 is being refunded.

3. Pursuant to a letter from the Clerk of the Supreme Court of the United States dated April 6, 2000 a corrected Petition was requested for an Extraordinary Writ upon an appeal of the Final Decree of Divorce entered on April 10, 1997 based on an application of the Virginia Supreme Court Rule 1:1 (commonly referred to as the 21 day rule). Once opened the Court may of review all matters in the case. The following are addressed to be reviewed:

a. July 25, 1995. The original Bill of Complaint was filed. No attempt at personal service was made although Appellant was a practicing attorney with a known office which he attended every day, he was Editor and Publisher of *The Daily Report* with regular office hours and his place of abode was well known.

b. November 2, 1997. The Honorable Robert P. Frank held a *pendente lite* hearing. At this point Judge Frank is made aware of the fact that there is no Proof of Service of the Bill of Complaint of any kind in the file.

c. November 7, 1995. Judge Frank notified the Supreme Court of Virginia that all judges of the Seventh Circuit have recused themselves and asks for appointment of a substitute judge.

d. November 17, 1995. Judge Frank entered an *in personam* order based on the hearing held on November 2, 1995 (Exhibit No. 6 App pg 17).

e. December 22, 1995. Justice A. Christian Compton appointed Retired Judge James C. Godwin to hear the case. Appellants position is that this appointment is null and void, being based on an application by a judge who has held a hearing without jurisdiction, recused himself from the case, and then signed an order based on the hearing.

f. May 7, 1996. Ned Massey III certifies that he served the original Bill of Complaint filed July 25, 1995 by posting on Appellant's door and video-taping Appellant removing it. This solves the problem of getting personal service on a knowledgeable attorney without his knowing he had been served (Exhibit No. 7 App pg 19). Appellant raises the question if this was with the prior approval of Judge Godwin.

4. Appellant contends that Kenneth B. Murov committed numerous acts of fraud acting as attorney for Appellant's late wife and as co-administrator of her estate. Fraudulent actions to be examined include but are not limited to the following:

a. Appellant and wife were married on September 22, 1956. The lot on which the marital residence was built was conveyed to "Louise B. Davis and Samuel B. Davis, Jr. wife and husband as tenants by the entirety with right of survivorship as at common law. Murov permitted an inventory to be filed with language "lot before marriage, home after" and wife to testify that she owned the lot before marriage, knowing the same to be false as the conveyance deed is a matter of public record . This testimony, known to be false by both plaintiff and her attorney is enough alone to cause the decree to be null and void.

b. Virginia Real Estate Trust is a Real Estate Investment Trust organized under the laws of the State of Virginia and recorded in all area court houses. As such it has holders of Certificates of Interest (shareholders). Murov knew that there were other shareholders than Appellant and his wife. On wife's inventory in regard to her interest in Virginia Real Estate Trust it was stated "(We ask that Commissioner make no disposition since we don't know value. The Commissioner in Chancery, in his report states "D Virginia Real Estate Trust This entity was created during the marriage and, for the purpose of equitable distribution there is presently insufficient evidence with which the Commissioner can assess a valuation of same" (Pgs. 3&4 Commissioner's Report Exhibit No. 10 App pgs 25 & 26)." Notwithstanding such knowledge, Mr. Murov represented to the court that the parties were 50/50 owners of all VRET property which was not the finding of the Commissioner. Property of Virginia Real Estate Trust was presented to the Commissioner on Appellee's inventory prepared by Murov as if it is martial property as a deliberate attempt to deceive the Court. However, the deeds are quite clear as to the ownership of said properties. Because of Murov's deliberate misrepresentation, the trial court allowed Murov to take possession of and sell two pieces of real property, namely 515 Homestead Avenue, Hampton, titled in Virginia Real Estate Trust and 628 Lee Street, Hampton, titled in S. B. Davis, Jr. and Louise B. Davis, Trustees of Virginia Real Estate Trust. Murov again deliberately deceived the court in his representation that the money held by the court in the Simmons Land Trust suit was the same as the Virginia Real Estate Trust. Later, in December 1999, he represented to the court that the money in the Simmons Land Trust suit was a newly discovered asset. The transcript of the April 10, 1997 hearing clearly shows that Murov had full knowledge of the assets of the suit in Chancery involving the Simmons Land Trust and the

file was completely at his disposal for discovery. Therefore if Murov were not quilty of fraud on the court he is certainly subject to the doctrine of estoppel. Appellant argued this point in the trial court.

. Murov not only misrepresented to the court in his Motion for Relief that the Simmons Land Trust was a newly discovered asset, he had previously filed a motion against Appellant in the Simmoms v. Davis suit for fraud in demand of the funds which Judge West refused. At the December 3, 1999 hearing Murov asked the court to include any property that "...ultimately Mr. Davis may have an interest in to be classified as a marital asset and be subject to equitable distribution."

c. Murov falsely represented to the Court that three bearer bonds in the amount of $5,000 each were gifts from Appellant to his wife, despite there being no evidence of this on wife's inventory, no testimony by her to this effect and knowing that Appellant had publicly accused her of stealing these bonds. These bonds remained in Louise Davis's possession until her death. At a hearing on April 10, 1997 Murov admitted there was no evidence concerning the bonds (Exhibit No. 19 App pg 56 pg 7, lines 5-11). Notwithstanding, Judge Godwin took jurisdiction over the bonds (Exhibit No. 4 App pg 9) and divided them after stating that "The bonds---of course, the bond that was given to him by his aunt belongs to him....." (Exhibit No. 20 App pg 57 transcript pg 9, lines 17-20). All the bonds came from Appellant's aunt.

d. As co-administrator of wife's estate he came into possession of the bonds which included the one in the amount of $5,000 registered to Louise D. Haynes, the aunt of Appellant, said bond being with the three bearer bonds listed on the Inventory of Appellee's estate. He has concealed the registered bond or converted it to his own use. In the April 10, 1997 hearing he concedes that there is no claim against the registered bond but that bond has not

been returned to the Appellant. (Exhibit No. 19 App pg 56 transcript, pg 7, Lines 15-19). It would have been easy for Murov to cash the bond because Appellant's aunt and Appellant's wife the first name louise and the last name Davis at one time. As the administrator of the Estate of Gladys Louise Barclay (Davis) all he had to do is file a "one and the same" affidavit. The affidavit from a partner in the third largest law firm in the state would not be questioned.

e. As co-administrator of wife's estate he came into possession of a five carat diamond ring that did not belong to his decedent. Murov, his co-administrator John W. Churchill, heirs Leila Barclay Hine, Sarah Barclay Howard and Ann Barclay Batkins knew that the ring belonged to Appellant's aunt, but notwithstanding converted it to their own use.

Appellant sent copies of two petitions for writs of prohibition filed with the Supreme Court of Virginia to the Supreme Court of the United States with the request that they be filed with the appeal of the final decree of divorce entered on April 10, 1997. Appellant later filed a petition for an extraordinary writ in forma pauperis with proper service on Appellee. The Supreme Court of the United States apparently elected to treat the two petitions for writs of prohibition and the petition for an extraordinary writ all as one petition for an extraordinary writ. It returned the petitions for writs of prohibition saying that they had to be corrected and the corrected filing served on Appellees. It also sent forms for filing in forma pauperis. Appellant responded that he would be able to obtain the necessary funds to file in "the regular way", that is by paying any filing fee and having the petition printed by an approved pri. The petition for an extraordinary writ was based on the reopening of a divorce suit already under appeal. The status of Appellant's filings with the supreme Court of the

United States is in an indeterminate status as the same case proceeds through the Virginia courts.

PRINCIPLES OF LAW

I. The first issue in this case asks that in the absence of fraud upon the Court, can a case be reopened after the expiration of twenty-one days after entry of the final decree (Rule 1.1 of the Supreme Court of Virginia) for the purpose of taking evidence on property that was available during trial? Documents filed in answer to Subpoena *duces tecum* in December of 1996 shows clearly that the property in question, monies held in the court in a suit styled Mckinley Simmons vs. S. B. Davis, Jr., which is the subject matter before the hearing on December 3, 1999 was identified before the entry of the Final Decree (Exhibit No. 4 App pg 9). The question was raised by the appellant in the Objection to Report (of the Commissioner in Chancery) January 31, 1997. Mr. Murov made a convoluted attempt to tie this property to the Final Decree of Divorce, insisting that the Court had jurisdiction over Virginia Real Estate Trust which is not mentioned the final decree. However the property of Virginia Real Estate Trust at 628 Lee Street, Hampton and 515 Homestead Avenue, Hampton is referred to as if it were the jointly held property of Appellant and wife. (Exhibit No.3 pg 3 para 2, pg 4). This is a deliberate fraud on the part of Kenneth B. Murov who prepared the Decree for entry. He completely contradicts the report of the Commissioner and the inventory of assets prepared by Louise B. Davis.. Mr. Murov does not mention the ten thousand dollars ($10,000.00) which Louise Davis identifies in her inventory as belonging to Virginia Real Estate Trust and although he brings it before the court in October of 1998, eighteen months after the Final Decree and almost a year after the death of Appellant, no accounting for those funds has every been made and no funds have accrued to the benefit of the Virginia Real Estate Trust shareholders.

Murov went to the Hampton Court and secured another $8000 of Virginia Real Estate Trust money, based on his misrepresentation of the Commissioner's Report. No accounting for these funds has ever been made and no funds have accrued to the benefit of the Virginia Real Estate Trust shareholders.

Appellee's argument at the hearing of December 3, 1999 seemed to be founded on the theory that Appellant's non-appearance at proceedings prior to the issuance of the divorce decree strips him of all rights to his property, to a fair trial and to appeal. In Bowers v. Bowers, 4 Va. App. 610, 359 S. E. 2d 546 (1987) it is stated that adequate discovery techniques are available to the party to enable them to obtain evidence to identify, classify or evaluate marital or separate property. The Appellee at all stages has had the full power of the court available to compel testimony, answer interrogatories and produce documents. Appellee and the Commissioner should have exercised the power to discover and clarify the ownership of assets. Appellant has always contended and retains that contention to this day that there has never been personal service on him. For that reason Appellant could not give credibility to bad service at the lower court level. Knowing the requirements and power of the law, Appellant answered the subpoena duces tecum served on him (Exhibit No. 21 App pg 58).

The first question before this Court is how such hearings could be held before the Honorable James C. Godwin to reajudicate matters of which the trial court's time (21 days) has expired for changing a written order and after the death of Louise B. Davis.The defects in the "Final Decree of Divorce" as entered by the trial court can not be deemed clerical errors.

II. The second issue involves the same question of the violation of the Supreme Court of Virginia Rule 1.1 and the

violation of Code of Virginia @ 8.01-428. The record clearly shows that service of the Motion for Relief (Exhibit No. 14 App pg 45) was made on September 18, 1998 to a hospitalized patient before a motion for reinstate was made. The record does not show that any motion for reinstatement was ever made. There is no indication in the record that there is any correspondence in the clerk's office until September 29, 1998. The fundamental question is on what grounds could such a motion have been made and on what grounds was the reinstatement order finally entered in March of 1999. In the transcript of the December 3, 1999 Murov attempts to present before the court that Judge Godwin reopened the case pursuant to an order by the Supreme Court of Virginia No such Order appears to be in the file. The appellant as of this date has never received a copy of Judge Godwin's Order dated November 9, 1998 or any accounting for funds belonging to Virginia Real Estate Trust.

Subsequent to the order of November 9, 1998, Mr. Murov has proceeded to sell said property of Virginia Real Estate Trust. The property at 628 Lee Street which had an assessed value in excess of seventy thousand dollars ($70,000) at the time of Mr. Murov's appointment as special commissioner, was sold to Martin R. Lautman for fourteen thousand one hundred fifteen dollars. ($14,115.00). Mr. Lautman sold this property several months later for seventy four thousand five hundred dollars ($74,500.00) and the purchaser received a 100% FHA loan.

The property at 515 Homestead which had an assessed value in excess of $70,000.00 and had just been repaired to bring it to code for rental at the time of Mr. Murov's appointment as Special Commissioner and had outstanding bills for the repairs to Harry Mulder. This property was conveyed to Martin R. Lautman for $20,000.00 and conveyed out by Mr. Lautman within days. The house has

been occupied since that time with no apparent improvements. The land value in the city of Hampton on residential property is always $10,000 or greater. To date neither Appellant or any shareholders of Virginia Real Estate Trust have received any proceeds for this conveyance. Even the Commissioner, having been presented with the fraudulent fact that these properties were jointly owned marital property, deem that the sale should produce approximately $65,000 each for investment and income purposes.

The commercial property at 10368 Warwick Boulevard belonging to S. B. Davis, Jr. and Louise B. Davi was the office of *The Daily Report* and Appellant's place of business. It was locked within days of his emergency admission to Riverside Hospital in 1998. Within weeks it was sold to DK Nunnally Co. who is Appellant's business neighbor and had already discussed the possible purchase with Appellant. However, Neal Rosenbaum was paid a commission of $3,000 for a ready made sale after Mr. Nunnally contacted Kenneth Murov. The commercial row building sold for $50,000.. Mr. Appellant received less than $6,500 in proceeds from this sale.

Gladys Louise Barclay was the youngest of five girls born to Tom and Maude Barclay, of the Barclay and Sons, Jewelers family. She and Appellant married in 1956, her second, his first. They had no children. Together they formed a number of small mortgage corporations and when Virginia trust law was changed, they formed Virginia Real Estate Trust, probably the first Real Estate Investment Trust (REIT) in Virginia. Its' final capitalization was four hundred and forty six thousand dollars ($446,000), funded by many shareholders. It started out as a second mortgage investment company but later found its' niche in wrap-around (all-inclusive) loans.

Appellant and his wife worked together all of their lives and formed *The daily Report,*, a publication that reported public records such as deed transfers, marriage licenses, building permits, new lawsuits, judgments and bankruptcies, all on a daily basis. The installation of a computer for the bookkeeping of Virginia Real Estate Trust and the typesetting for *The Daily Report* caused her to look elsewhere for a challenge. Louise Davis was an experienced legal secretary with impeccable credentials, having worked for Warwick City Manager J. Clyde Morris, Warwick City Attorney Conard Mattox, lawyers Dick Newman, Bill Allaun, Fred Bateman, Frank Blechman and Arthur Woltz. She was also a licensed Real Estate Broker. She had applied for a job as Real Estate Coordinator with the City of Newport News, a position being vacated by Carolyn Howard Cumming, the sister of Ward Howard who was married to Louise's sister Sarah. Louise was very qualified for the position and she was scheduled for an interview when on October 19, 1988 (Yorktown Day) she was severely injured in an automobile accident. She was permanently disabled and from that time until she left the marital abode she was cared for by the Appellant. Appellant represented her in negotiations with the insurance carrier and obtained a settlement for her of $282,000. Appellant took no fee for services. The proceeds were deposited solely in her name with the exception of $21,000.00 that purchased the shares in VRET of Wilfred Pimblett. None of Appellee's steelement funds were used to pay the line of credit loan on 40 Barclay Road.

Appellant and his wife continued an amiable relationship until a disagreement about appellant's interest in the victims of the David Murray theft. On October 29,1991 David Murray's bookkeeper blew the whistle on a $42 million scam to the Virginia State Bar. The following day two agents from the Federal Bureau of Investigation

called on her. They told her to keep working for him to gather more evidence. She endured it for several more weeks but finally left with emotional problems. The VSB and the FBI did nothing until February 6, 1992 when they raided his office. He killed himself the following day with two (!) shots into his chest and stomach from a .357 magnum handgun with exploding bullets. The suicide was on federal property on the Outer Banks in North Carolina and was investigated by the National Park Service. When Appellant learned of the magnitude of Murray's theft he was incensed, having published reports of lawsuits against him that should have instantly dried up his credit with banks and alerted the Virginia State Bar. Appellant knew that when large sums of money leave banks, the banks and their lawyers know where the money went and why. Appellant spent a lot of money, primarily on ads in the Sunday edition of *The Washington Post* asking tough questions of banks and their lawyers. Appellant also ran ads in 31 Virginia newspapers seeking people cheated after October 29, 1991, finding a number of people who collectively lost over $750,000.

With no children, appellant was Louise's sole heir at law and by Will. A will which she never redrafted and was supposedly not found in her possessions. Also, a very valuable piece of waterfront property, plus other real estate held as tenants by the entirety with right of survivorship would pass to Appellant if he was the survivor of the marriage. Banks, lawyers, Murray's salesmen and others whose toes were being stepped on enlisted the eager support of Louise's sisters to get Appellant out of the picture by convincing her that he was mentally ill, and appellant was going to waste her settlement although none of her separate funds were ever used. Appellee, who was quite ill and on medications at the time was convinced by outside parties that the only way for appellant to get help was to have him

committed. Psychiatrists were enlisted for the project, and she was overwhelmed by her sisters, doctors and others with an axe to grind.

This outside influence did their job too well however, for on late Sunday night June 18 and early Monday morning she called Pat Fromal, called her names, blamed her for appellant's interest in the David Murray case and said that Appellant was going to be committed. Ms. Fromal's answering machine recorded the call. On June 22, 1995 the first attempt to commit Appellant was made. It failed because the two female police officers were not in on the plot. They arrived around 6:00 a. m., did not see Appellant as a danger to his wife or himself and refused to stay until 8:00 a. m. when the Contact Office opened and an evaluator could be called to the scene. Louise became hysterical stating that "she couldn't do what she was told to do" and had the officers call her sister Leila to come pick her up from the home. Appellant published the transcripts of the calls to Pat Fromal and the 911 call of June 22 in *The Daily Report*. After this publication she filed for divorce on July 25, although a witness, Janet Lansing, said that it was very tearful and stressful for Louise. The second attempt to commit Appellant was made on December 8, 1995, using Judge Frank's order of November 17th as the basis for a five unit police raid on Appellant's residence. The divorce was granted on April 10, 1997. Louise died on November 14, 1997 without changing her Will. However the Will disappeared from the home. Her dying words to John Churchill were, "I do not want to hurt Sam". After the divorce Louise would repeatedly call begging Appellant to come home, but when he asked her to write him a note she said "they won't let me".

Other attempts were made to stop Appellant's efforts to expose the Murray scandal. Appellant and his

wife had a $250,000 line of credit with Old Point National Bank of Phoebus. The loan was secured by a deed of trust on everything they owned. Despite never having missed payment on the debt service, Old Point called the loan. Appellant obtained the money from his aunt and paid off the balance of $189,873.36. This pay-off freed all the assets, the largest of which was the marital residence. The money for this pay-off could be traced to the sell of Appellant's aunt's stock. Notwithstanding this pay-off, the Commissioner awarded the marital residence to the appellee.

Appellant underwent psychiatric evaluation during his four month hospitalization and was found mentally and physically well enough to return home and care for himself.

The essence of this case is jurisdiction, beginning with the entry of an in personam order without personal service and continues through this appeal which newly addresses hearings and orders issued after the final decree of divorce. There are many questions of jurisdiction and Appellee in no way can contend that objections to jurisdiction have not been expressed from day one. Under Virginia supreme Court Rule 5A: 18 the primary purpose of the contemporaneous objection rule is to advise the trial judge of the action complained of so that the court can consider the issue intelligently and, if necessary, take corrective action Head v. Commonwealth 3 Va. App. 163, 348 S. E. 2d 423 (1986).

The requirement for noting an exception to a final adverse ruling of the trial judge has been eliminated Martin v. Commonwealth, 13 Va. App. 524, 414 S. E. 2d 401 (1992) Johnson v. Commonwealth , 20 Va. App. 547, 458 S. E. 2d 599 (1995). The specific procedure for noting exceptions is not mandated. Neither Virginia Code Sec. 8.01-384 nor Rule 5A:18 mandates a specific procedure to preserve for appeal an issue objected to in the trial court. A simple statement that embodies the objection and reason

therefor suffices. Lee v. Lee 12 Va. App. 512, 404 S. E. 2d 736 (1991).

Appellant preserved the issues now on appeal before this Court in a number of ways. Objections were filed to the Commissioner's Report which were overruled by the court and the entry of the decree of divorce ensued. After the final decree appeals were filed noting violations of the law of Equitable Distribution which were inherent and apparent in the Commissioner's Report. The final decree (Exhibit No. 4 App pg 9) states:

> It is, accordingly, Adjudicated, Ordered and Decreed that the report of E. Thomas Cox, Commissioner In Chancery be and it is hereby approved, ratified and confirmed in all respects; and it is further
>
> Adjudicated, Ordered and Decreed that Defendant's objections to the Commissioner's Report filed herein,are hereby overruled; and it is further

Paragraph 8 of the Bill of Complaint states;

> 8. Pursuant to Section 20-107.3 (1950) Code of Virginia as amended plaintiff moves that the court determine legal title between the parties and the ownership and value of all real and personal property of the parties, and classify such property as provided by law value such property, and determine the equitable distribution of such property.

The trial court entered the FINAL DECREE OF DIVORCE on April 10, 1997. This decree does not

incorporate the commissioner's report and therefore does not address Equitable Distribution as requested in Paragraph 8 of the Bill of Complaint. It violates the requirements for perfecting Equitable Distribution. This decree does not retain jurisdiction over Equitable Distribution. The property was divided without regard to contribution or the laws of Equitable Distribution. If it is ruled that the court had valid jurisdiction when it entered the decree, this would be the final order in the case and it so states (Exhibit No..

> Nothing further remaining to be done in this matter, it is ORDERED stricken from the docket and filed among the ended causes.

And no equitable distribution could be granted. However, because the court did not grant equitable distribution as requested and did not bifurcate the final order the order is void.

IV. Will Appellant be allowed to re-open this case to have heard and determined matters of fraud by Kenneth B. Murov? The testimony of Appellee, now deceased, before the Commissioner on was in the presence of Murov and Appellee's sister Leila Barclay Hine. It was well known to the three of them that the lot on which the marital residence was built was not conveyed until after the parties were married and that Appellant's aunt had paid off the line of credit loan. Appellant had Appellee deposit her settlement money in her own name and had no access to it. The property at Lee Street and Homestead Ave were not jointly held marital property but the property of Virginia Real Estate Trust. This fraud should be exposed.

SUMMARY OF THE ARGUMENTS

1. It is undisputed that there was no service of process on a Bill of Complaint filed on July 25, 1995 by posting, publication or personal service until May 7, 1996 when Ned Massey stuck the papers in the door handle and video-taped Appellant removing them. Regardless of how that that exercise is finally construed until that date this was simply a suit that had been filed, nothing more. And yet examine what took place between the filing and that time. Judge Robert P. Frank holds a hearing for a severly disabled 65 year old lady who is convinced that she is well on her way to leaving the convalescent home and returning to her own home. Judge Frank and the other three judges recuse themselves and ask the Virginia Supreme Court to appoint a substitute. Armed with Judge Frank's order the lady and her lawyer, Kenneth Murov stage a five unit police raid on Appellant's home. The police log of the incident states "Comp is elderly female, will stby outside". The Supreme Court appoints retired Judge James C. Godwin to substitute. All of this on a defendant who has a known place of business and residence and can be seen coming and going every day. Appellant says that the appointment of Judge Godwin is null and void. Appellant says that his Constitutional right to due process and equal protection of the law has been violated. Constitution of the United States Amendments 5 and 14.

2. Personal service by posting and video-taping appellant removing the papers. Appellant is unable to find any cases in any jurisdiction where it has been an approved method of personal service. Its' purpose is clear. Serve Appellant without his knowing he had been served. Appellant asks the Supreme Court of Virginia for a definitive answer. What if it is ruled not personal service?

Appellant argues that because of its' deviousness it should be ruled no service at all. If this argument fails and it is held to be posted service, what then? Judge Godwin can dissolve the marriage, nothing more. Appellant says that his Constitutional right to due process and equal protection of the law has been violated.

3. Virginia Supreme Court Rule 1:1. All final judgment, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to being modified, vacated, or suspended for twenty-one days after the date of entry and no longer.....

The meaning of this rule is clear. The authority granted by the Code of Virginia @ 20-109 to modify a spousal support award is not an exception to the requirements of Rule 1:1. Hamilton v. Hamilton, No. 0830-90-4 (Ct of Appeals Apr. 23, 1991)

The case at bar is not one of first impression nor is it a case of clerical error. The twenty-one day rule is the most basic (and controversial) in Virginia law. The rule clearly bars further litigation. Hayes v. Hayes, 3 Va. App. 499, 351 S.E. 2d 590 (1986).

Where after twenty one days, the trial court has lost jurisdiction over the case and the final decree has become final and conclusive and additions, subtractions, or modifications made contrary to original final decree are void. Williams, v Williams, No 0384-88-2 (Ct of Appeals Feb. 14, 1989) This rule concerns further proceeding within every suit in which final judgment has been entered. Nikleson v. Ramsey, 233 Va. 161, 353 S. E.2d 783 (1987). Just as with Rook v. Rook, 233 Va. 92, 353 S. E. 2d 756 (1987), after expiration of the 21 days from the date the decree was entered, the trial court lost jurisdiction of the case, except for the limited purposes of revising child custody and support, neither applicable in the case at bar. And in Mcdysan v. Mcdysan, No 1085-86-4 (Ct of Appeals Nov. 1, 1988) where the decree entered by the trial court

constituted a modification of a previous order entered more than 21 days prior thereto, such a decree was an impermissible modification of the final order.

A final order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the subject matter and leaves nothing to be done in the cause save to superintend ministerially the execution of the order. Daniels v. Truck & Equipment Corp., 205 Va. 579, 139 S.E.2d 302 (1992). Rule 1:1 is mandatory (See Bogart v. Bogart, 21 Va. App. 280, 464 S.E.2d 157 (1995)in the absent of extrinsic fraud.

Appellant says that he is being denied the Equal Protection of the Law if the 21 day rule can be used in a death penalty case but is not applicable to his divorce suit.

3. There is no incorporation of the Commissioner's Report into the final decree. Consequently there is no inclusion of equitable distribution incorporated into the final decree. No order was ever issued by the court for an accounting for Virginia Real Estate Trust, only the recommendation of the Commissioner for such an order in his report. Since there was no order to compel interrogatories from the Appellant and no demand made for depositions, the Commissioner's Report failed to properly specify the marital, separate and hybrid interests of the parties in all properties in dispute and opened the door for fraud on the part of the Appellee. In DeWald v. DeWald No. 0388-97-1 (Court of Appeals February 3, 1998). The court found that under such circumstances, the Court of Appeals was unable to conduct a proper appellate review of the disputed award and had to set aside the decree in its' entirety and remand for further consideration by the trial court, guided by Section 20-107.3 of the Code of Virginia. This case is on point with DeWald in all respects and is not a case of improper bifurcation as in Christiansen v. Christiansen, 26 Va. App. 651, 496 S.E. 2d 132 (1998) .

This case before this court now includes the $96,959.17 held by the court in the Simmons Land Trust matter. This was never addressed in the Commissioner's Report. However, Simmons Land Trust and the identification of the shareholders of Virginia Real Estate Trust and the ownership of the property at Lee Street and Homestead Avenue were the issues raised by the Appellant in the objection to the Commissioner's Report which was overruled by the court. In essence the trial court held a hearing on December 3, 1999 and by order of January 6, 2000 in effect overruled its own order. This order involved the same property and the same parties on which the judge had previously ruled in overruling the objection to the commissioner's report.

In answer to a subpoena *duces tecum* dated December 3, 1996 Appellant stated:

> 1. That the only asset not under the joint control of the parties to this cause is the interest of the defendant in funds held by this court in a suit styled McKinley Simmons v. S. B. Davis, Jr. Documentation in regard to that suit is in possession of the plaintiff.

In objection to the report of the commissioner dated January 31,1997
Appellant states:

> 3. The report of the Commissioner does not address the approximately $75,000 held by this court in a suit styled McKinley Simmons vs. S. B. Davis, Jr.

Appellee made no claim to these funds during her lifetime, knowing she had no claim to them. Two years after her death Kenneth B. Murov, co-administrator of her estate and

her divorce lawyer filed an intervenor in Simmons v. Davis seeking one-half of the money and getting an order from the divorce trial court judge to that effect. In Brandenburg v. Brandenburg, 617 S.W. 2d 871 (Ky. Ct. App. 1981), the Kentucky court of appeals approved a formula that apportioned the marital and non-marital components of hybrid property in the same percentages as their respective contributions to the total equity in the property. The Virginia Court of Appeals, citing Brandenburg accepted the use of this formula and found the commissioner erred when he calculated the value of husband's separate property in home and promissory note. Hart v. Hart, 27 Va. App. 46, 497 S.E. 2d 496 (1998). The Court of Appeals of Virginia also approved the "Brandenburg formula" in Martin v. Martin, 27 Va. App. 745 501 S.E. 2d 450 (1998). In 1996 the Court of Appeals of Virginia reversed and remanded in Mann v. Mann, 22 Va. App. 459, 470 S.E. 2d 605 (1996) noting that the husband's theory of classifying as separate the income earned passively by his separate contribution was entitled to the percentage formula used in Brandenburg.

The Commissioner was aware of the funds in the Simmons suit. Even a cursory inquiry by the Commissioner would have disclosed that a $400,000 piece of waterfront property was free of all mortgages and where the money came from to pay them off. Neither the Simmons funds nor the $189,873.36 Appellant got from his aunt to pay off Old Point National were considered in whatever formula, if any, the Commissioner used. Certainly the "Brandenburg Formula" was not used. This is a fatal flaw. The Commissioner hears all the evidence and makes a recommendation to the court which has the weight of a jury verdict. He has the duty to make an equitable distribution of property owned by the parties. This is not 50/50 but is a complex process, taking into consideration inheritance, property owned before marriage and many other factors.

He has failed his duty. Notwithstanding his errors the trial court ratified his report, but did not incorporate it into the final decree. Thus there is nothing in this case showing Equitable Distribution under the statute. The Supreme Court of Virginia reviewing the actions of the Court of Appeals under DeWald must decide that it does not have adequate evidence to decide the matter of Equitable Distribution and must remand the case to the Court of Appeals with instructions to void the FINAL DECREE OF DIVORCE in its entirety.

Under Virginia Code Section 20-107.3 the Appellee could have requested the circuit court to adjudicate the right of equitable distribution prior to entering the divorce decree and could have moved the circuit court to retain its' jurisdiction and adjudicate those rights after entering the divorce decree. Appellee did neither. This bars the Appellee from asserting these rights in the Virginia Courts. Toomey v. Toomey, 251 Va.168, 465 S. E. 2d 838 (1996).

The 1986 amendment to Section 20-107.3 was intended to limit the power and jurisdiction of divorce courts and prohibit them from separately adjudicating divorce and equitable distribution. The General Assembly's use of the phrase "retain jurisdiction" was a purposeful decision to limit the court's power. Erickson-Davidson v. Erickson-Davidson 12 Va. App. 381, 404 S. E. 2d 388 (1991). Without the express use of the phase "retain jurisdiction" the trial court has no powers.

4. A motion to quash was filed for the hearing of October 5, 1998. No other papers including the order were ever received by Appellant regarding the hearing of October 5, 1998. Three Writs of Prohibition stating objections and reasons were filed before and after the hearing and before the order was entered on the hearing of December 3, 1999.

5. In addition to official procedural filings before the court the Appellee's attorney Kenneth B. Murov

received notice that there were $20,000 of Appellant's aunt's bonds to which Appellant is sole heir had been stolen from Appellant's marital abode. The court had knowledge of the ownership of these bonds before ruling on marital property in the final decree of divorce entered on April 10, 1997 and should have known that any joint ownership claimed by the Appellee was fraudulent. The court's ruling in that order does not adhere to Hodges v. Hodges, 2 Va. app. 508, 347 S.E. 2d 134 (1986) which mandates that the court determine ownership and value and that this determination must go beyond mere guesswork. Between spouses there is a presumption of gift except when rebutted and when evidence of inter spousal gift is lacking. Kelln v. Kelln, 30 Va. App. 113, 515 S.E. 2d 789 (1999). In Theismann v. Theismann, 22 Va. App. 577, 471 S.E. 2d 809 (1996) aff'd, on reh'g en banc 23 Va. App 697, 479 S.E. 2d 534 (1996). the wife had to prove the existence of a gift because the ordinary presumptions to inter spousal gifts did not apply. In this case the Appellee never claimed the bonds were a gift and no evidence was presented on behalf of the Appellee and Murov so addmitted at the hearing of April 10, 1997. The only information other than Appellee's attorneys assertion was the statement entered in the file from the Appellant that the bonds had been removed from his residence without permission. Under the Virginia law a party claiming entitlement to rights and equities in marital property by virtue of an inter spousal gift must prove the donative intent of the donor spouse and the nature and extent of the donor's intentions. Lightburn v. Lightburn, 22 Va. App. 612, 472 S.E. 2d 281 (1996).

The motion to set aside the hearing (motion to quash) and the motions for recusal were presented to the court on December 3, 1999 and overruled (Exhibit No. 5, pg 140: transcript pg. 14)

The question of jurisdiction was raised before the trial court during the hearing of December 3, 1999. This

included the question of improper ejection from the marital residence and improper service of process. Appellant states "...my contention is that your authority has expired". In Lee (supra) the appeal court noted that the exception need not be noted on the face of the order and re emphasized this in Howard v. Howard No. 0735-91-4 (Court of Appeals March 31, 1992) Rule 5A:18 does not require an exception be noted on the face of the order when the record makes clear that the Appellant has brought the matter to the attention of the trial judge and the trial judge has ruled thereon.

CONCLUSION

For the reasons given above Appellant asks the Court to remand this case to the Court of Appeals with instructions to vacate all orders of the Circuit Court for the City of Newport News entered in this cause, specifically but not limited to the Final Decree of Divorce entered on April 10, 1997 and the orders dated November 9, 1998 and January 6, 2000.

The Appellant also asks the Court to set aside all actions of the Special Commissioner in Chancery and to restore properties as originally titled.

Respectfully submitted,

- Samuel Bunyan Davis, Jr

CERTIFICATE

I hereby certify that on December 23, 2000 I deposited four copies of the foregoing Petition for Appeal in the U. S. Mail, certified, postage paid to David B. Beach, Clerk, Supreme Court of Virginia, Supreme Court Building, 100 North 9th Street Fifth Floor, Richmond, Virginia, 23219 and one copy in the U. S. Mail, postage paid to Kenneth B. Murov, 690 J. Clyde Morris Boulevard, Suite D, Newport News, VA 23601, and one courtesy copy to Matthew W. Smith, 600 Thimble Shoals Boulevard, P. O. Box 12888, Newport News, VA 23612-2888.

Samuel Bunyan Davis, Jr.